IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-3055

ROBERT J. BLANCIAK; RAYMOND BOWMAN; WILLIAM BURKETT; MARLIN D. BYERS; RICHARD COOK; ROBERT E. DELLEDONNE; JACK DELCIMMUTO; RICHARD T. FARAH; DONALD E. HOLMES; JAMES MARKBY; DONALD C. MILLER; HOWARD MUMAU; DOMINIC POCETTI; EDWARD E. PRIMACK; ANTHONY RODNICKI; WILLIAM D. ROWE; DON SHELLHAMMER; PAUL R. SIBIK; JAMES WALKER; THEODORE W. WALKER; FRANCIS N. AMARANTO; LEROY A. CALDERONE; RONALD E. CALHOUN; LOUIS E. CARAVAGGIO; JOSEPH W. CLARK; GEORGE L. FLEEGER; RONALD R. FULTON; RICHARD L. GEORGE; JOHN M. GULYAS; JACK C. HESKETH; ROBERT HUTCHERSON; ROBERT D. KNABB; BERNARD C. KUMPF; WILLIAM JOHN MORDA; JAMES E. PATTY; LAURA G. POSKUS; ARTHUR L. RAMER; F. EUGENE SMELTZER; ROBERT L. STEWART; WESLEY E. SUMAN; DOUGLAS E. TALMADGE; JACK WILMOT, JR., individually and on behalf of all other persons similarly situated,

v.

ALLEGHENY LUDLUM CORPORATION; UNITED STEELWORKERS OF AMERICA; and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR & INDUSTRY; HARRIS WOFFORD, Secretary of Labor and Industry; MAURICE NATES; JOHN KRISIAK; STELLA RAVETTO; R.C. THOMAS; CHARLES E. SWARTZ, and various JOHN DOE, and or JANE DOE(S)

ROBERT J. BLANCIAK, RAYMOND BOWMAN, JOSEPH W. CLARK; JACK DELCIMMUTO; RICHARD T. FARAH, RICHARD GEORGE; JOHN M. GULYAS; JACK C. HESKETH; DONALD E. HOLMES; ROBERT D. KNABB; JAMES MARKBY; DONALD C. MILLER; JAMES E. PATTY; DOMINIC POCETTI; EDWARD E. PRIMACK; ANTHONY RODNICKI; WILLIAM ROWE; DON SHELLHAMMER; F. EUGENE SMELTZER; ROBERT L. STEWART; DOUGLAS E. TALMADGE and JAMES WALKER,
Appellants

BRIEF FOR APPELLANTS

On Appeal from the Order of December 30, 1994, of the United States district Court for the Western District of Pennsylvania at Civil Action No. 90-931 which Granted Summary Judgment to the Defendants/Appellees.

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction in the District Court of Appellants' claims under the Age Discrimination in Employment Act 29 U.S.C. § 621, et seq. is conferred by the Act 29 U.S.C. § 626(c). Jurisdiction of Appellants' constitutional claims under 42 U.S.C. § 1983 is conferred pursuant to 28 U.S.C. §§ 1331 and 1343.

Appellants filed a notice of appeal on January 25, 1995 from a final order disposing of all claims of the United States District Court for Western District of Pennsylvania dated December 30, 1994. Appellate jurisdiction exists under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. WHETHER CONGRESS ABROGATED THE COMMONWEALTH'S ELEVENTH AMENDMENT IMMUNITY WHEN IT IS SUED AS AN EMPLOYMENT AGENCY UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT?

This issue was raised by the Commonwealth in the Answer to the Complaint and as part of the summary judgment motion, App. 113, 194, and ruled upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 51-53.

II. WHETHER THE ELEVENTH AMENDMENT BARS THE DISTRICT COURT FROM GRANTING THE EQUITABLE REMEDY OF FRONT PAY IN LIEU OF REINSTATEMENT FOR CONSTITUTIONAL VIOLATIONS ARISING IN THE EMPLOYMENT CONTEXT?

This issue was raised by the Commonwealth in its Supplement to Motion for Summary Judgment App. 202-203 and ruled upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 54-58.

III. WHETHER APPELLANT STEELWORKERS CLAIMS FOR INJUNCTIVE RELIEF AGAINST THE COMMONWEALTH TO REMEDY THE CONTINUING EFFECTS OF THE RESULTS OF A DISCRIMINATORY EMPLOYMENT TEST ARE MOOT BECAUSE OF A SETTLEMENT OF THEIR CLAIMS AGAINST THE EMPLOYER REGARDING HIRING?

This issue was raised and ruled upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 59-64.

STATEMENT OF RELATED PROCEEDINGS

A previous appeal was filed by the Appellants in this Court from the District Court's original Memorandum Opinion and Order dated June 7, 1994. That appeal was filed at No. 94-3363 and was dismissed for want of jurisdiction by Order of this Court entered September 30, 1994.

Counsel for Appellants is not aware of any other cases related to this case.

STATEMENT OF THE CASE

Appellants herein are all former employees of United States Steel Corporation (now USX) who filed a civil action against Allegheny Ludlum Corporation, the United Steelworkers of America, and the Commonwealth of Pennsylvania, Department of Labor and Industry, alleging that the staffing of the Vandergrift plant, formerly owned by USX and sold to the Defendant Allegheny Ludlum, violated the Age Discrimination in Employment Act and rights secured to them by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and actionable under 42 U.S.C. § 1983. (Appendix p. 68, hereinafter "App.").[1] Following discovery, the Appellant steelworkers reached an agreement which settled all of their claims against Allegheny Ludlum Corporation and the United Steelworkers of America. (Sealed Appendix p. 5, hereinafter "S. App.").[2] The District Court approved the stipulation of dismissal agreed to by the Appellant steelworkers and Allegheny Ludlum and the United Steelworkers of America by Order dated February 17, 1993. App. 535. Thereafter, the District Court proceeded to resolve the outstanding summary judgment motions filed by the Commonwealth and by Order dated December 30, 1994, granted summary judgment in favor of the Commonwealth and dismissed all of the

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[1]Appellants raised other claims, including, inter alia, claims under Pennsylvania state law and the Employee Retirement Income Security Act. Those claims are not relevant to the issues presented herein.

[2]Appellants have requested leave to file a separate appendix under seal. The settlement agreement and joint tortfeasor release are sealed pursuant to the Order of the District Court dated December 11, 1994. S. App. 1. All of the pleadings below filed under seal relevant to the appeal herein are reproduced in the sealed appendix.

remaining claims against the remaining Commonwealth of Pennsylvania Defendants with prejudice. App. 39. The District Court held that the Appellants' cause of action under the Age Discrimination and Employment Act was barred by the Eleventh Amendment, that the Appellants' claims for front pay in lieu of reinstatement as a form of equitable relief for violations of 42 U.S.C. § 1983 were barred by the Eleventh Amendment, and finally that any remaining claims for injunctive relief, particularly to enjoin the Commonwealth's administration of the General Aptitude Test Battery (GATB) were moot. From that Order, the Appellants filed a Notice of Appeal to this Court on January 25, 1995.[3]

In January, 1988, United States Steel (now USX) placed its Vandergrift plant in an idled status and stopped manufacturing and shipping products from the plant. Allegheny Ludlum negotiated with USX to buy the plant and in June, 1988 purchased the plant from USX. App. 196, 212.

To staff the plant initially with an hourly workforce, Allegheny Ludlum decided to hire 55 hourly employees. Allegheny Ludlum and the United Steelworkers of America (USWA) entered into negotiations and reached an agreement with regard to the establishment of a bargaining relationship at the plant which was to apply to the 55 individuals to be hired initially. App. 196, 212-213.

Allegheny Ludlum agreed to hire its first 55 hourly employees at the Vandergrift plant from a group of more than 125 USX hourly employees who had worked at the plant

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[3]A previous appeal was filed by the Appellants in this Court from the District Court's original Memorandum Opinion and Order dated June 7, 1994 App. 41. That appeal was filed at No. 94-3363, and was dismissed for want of Jurisdiction by Order of this Court entered September 30, 1994.

and were members of the USWA. Appellants herein were members of that group. The agreement gave Allegheny Ludlum the right to select which 55 individuals to hire by providing:

> The initial 55 hires will have their continuous service for seniority purposes transferred to Allegheny Ludlum provided they pass a physical exam which includes drug testing.
>
> The Company has the absolute right to select and assign 30 of these 55 initial hires. The remaining 25 employees must first have the requisite skills and ability to perform the anticipated tasks. They will then be selected on the basis of continuous service. App. 197, 212-213.

Pursuant to the Agreement, Allegheny Ludlum agreed to establish a preferential hiring list for ex-Vandergrift employees who were members of the USWA. The Agreement provided in pertinent part:

> Hiring of Individuals Above and Beyond the Initial 55:
>
> The Company will establish a preference pool of ex-Vandergrift employees who had continuous service with USX as of June 2, 1988. If employees can meet the current hiring standards in effect at Brackenridge and West Leechburg, they will be hired, as new employees at Vandergrift as needed, in order of their USX continuous service. These hiring standards include meeting the appropriate scores in tests given by the Office of Employment and Security of the State of Pennsylvania as well as meeting any other state-imposed standards. App. 196-197, 212-213.

The New Kensington and Kittanning Job Service offices of the Commonwealth Appellee utilized and administered the General Aptitude Test Battery (GATB), for use in referring applicants to cooperating companies. Allegheny Ludlum asked that the test be administered. The Appellee provided GATB testing and referral to Allegheny Ludlum for its general laborer positions. App. 198, 206-208, 209-211.

Most of the Appellants were administered the GATB by the New Kensington or Kittanning Job Service offices. Seven Appellants were not tested and were not notified of the test. App. 198-200. The Appellants who were tested were notified by Job Service to appear for testing. The Appellants who were never notified of an opportunity to take the GATB test were willing to accept a referral of employment to Allegheny Ludlum. App. 264. Prior to 1988, all of the Appellants were senior hourly employees at the United States Steel plant at Vandergrift, Pennsylvania. All were over forty years of age. App. 70, 77, 78, 196.

Prior to taking the test, Appellants were mislead into thinking that no one could fail. App. 90. At the test site they were made to stand outside until the last moment and then rushed into the exam without being provided with proper explanations or materials. App. 96, 230. During an earlier test, an Appellant's dexterity problem involving his hands was not taken into consideration. App. 219.

The results of the test were atrocious. Only approximately four out of fifty testees, all of whom were experienced steelworkers, received acceptable scores to be referred to entry-level labor positions in a steel mill. However, perhaps this outcome was not surprising, inasmuch as the test was improperly administered as reported by Appellant's expert Robert Fitzpatrick, Ph.D. App. 262, 440-452.

In the wake of an outcry over the low scores, the Union belatedly arranged for some individuals to be retrained and to retake the test. This was contrary to the instruction of the Job Service at the June 1988 test: "You cannot be retested later." App. 106. Because of the coachability of the GATB, the validity of the retest has come into question, as has the ethics of giving it again in such circumstances. App. 440-450.

Apparently the hostility of the Appellee Job Service to older employees pre-dated the June, 1988 test. Under oath, steelworkers maintained that the Job Service refused to furnish them with applications to work at Allegheny Ludlum but freely gave out the necessary forms to young men. According to affidavits, the Job Service personnel, including present Appellees Krisiak and Ravetto, admittedly and willingly served as conspirators in achieving Allegheny Ludlum's goal of building a youthful workforce. App. 108-109. When Appellant Richard Farah threatened to bring a charge of discrimination against the state employees he was threatened with a Job Service "blackball" to prevent him from ever getting work in the region. App. 109. According to steelworker Appellant Jack DelCimmuto, Appellee Ravetto "did not blame Allegheny Ludlum for only wanting younger people, because if she had a business, she would hire younger people only and Allegheny Ludlum had a right to hire anyone they wanted, it was their business." App. 110. Ravetto also actively discouraged a senior worker from taking or retaking the GATB. (App. 154). A Vandergrift Job Service employee told Richard Farah he was too old to be referred as he (Farah) "could have a heart attack," surely strong evidence of age bias. App. 218.

Given the high experience levels of the Appellants, App. 79-92, 141-156, the test scores not only were absurd, but also had far-reaching implications. While still United States Steel employees, Appellants voted for the proposed Allegheny Ludlum manning agreement though it would initially create only 55 jobs. They believed they would be given preference for openings as operations expanded. App. 403-410. But the so-called "preference list" became a harsh sham and a barrier because the Job Service referred younger, albeit completely inexperienced, applicants to Allegheny Ludlum ahead of the ex-USX Vandergrift

employees. The results were dramatic. During discovery Appellants discovered a raft of inexperienced workers who received Allegheny Ludlum jobs. App. 146-147. One older experienced steelworker even saw his son who lacked any experience hired ahead of him, merely on the basis of a higher GATB score. App. 149. Moreover, the test system not only controlled opportunity at Allegheny Ludlum, but at other local industrial companies, including Keystone Power, Kensington Manufacturing, and Elgar. App. 219.

At Allegheny Ludlum, the GATB policy as implemented by Appellee had stark, quantifiable effects. At the time of Allegheny Ludlum's start-up in 1988, the forty named Appellants averaged 52.3 years old. According to discovery material submitted by Allegheny Ludlum, the average hiring age for Allegheny Ludlum's Vandergrift/Leechburg operation was 34.2 years. App. 146-147. Hence, the change was generational.

The age-bias of GATB is not a novel theory, and was not at the time that Appellee and Allegheny Ludlum implemented the test regimen. In 1987, the U.S. Department of Labor found that GATB scores tend to begin declining with the onset of middle age:

> The mean aptitude scores for each age interval are shown in Table 4. The analysis of variance results between age intervals were significant (at the .01 level) for each aptitude. The general pattern is for mean scores to increase slightly from the first interval (less than 20 years), stay about the same for the next two intervals (20-29 years) and then decline. App. 93, 311.

Appellees, who would like to be seen as neutral public servants who merely facilitate employment, actually took the lead in foisting the questionable test upon Allegheny Ludlum and the Appellants. The Job Service had a far more extensive participation in the procedure by which Appellants were not employed by Allegheny Ludlum than simply having been

provided with a list of names of individuals by Allegheny Ludlum who were to be tested. Conversations were held between Mr. Kinney, of the Kittanning Job Service, and Ms. Delvecchio, of Defendant Allegheny Ludlum Personnel Department, prior to the sale of the Vandergrift plant by USX to Allegheny Ludlum. These discussions were held regarding the need which Allegheny Ludlum would have for additional employees and the proposal that the Job Service would participate in referring persons for those jobs. App. 270-277.

The Appellee Job Service through its agent Terrence Kinney, Manager of the Job Service Office in Kittanning, first approached Defendant Allegheny Ludlum regarding the use of GATB testing in 1983. Mr. Kinney encouraged Allegheny Ludlum to utilize the GATB test for all of its general laboring positions, and to develop a mechanism, whereby Allegheny Ludlum could determine for its purposes whether or not the GATB test might be useful. Based upon the recommendation of Mr. Kinney of the Job Service, Allegheny Ludlum conducted the survey that Mr. Kinney recommended, and in his words "and when they did, they were very happy with that group; and based on that, committed to testing." App. 278-279, 284-285.

It is disturbing that the Job Service was in possession of evidence that the GATB test discriminated on the basis of age but continued to utilize the test and perform tests for Allegheny Ludlum and others. A United States Department of Labor directive dated June 20, 1988 was sent to all state employment agencies of which the Commonwealth is one. App. 287-300. It indicated among other things that a highly speeded test could disadvantage older workers compared to younger ones as the test scores would underrate the skills of the older examinees by confusing speed and ability. On July 21, 1989, the Job Service issued a

director's memorandum referencing a National Academy of Science Report of an 18 month study of the use of the GATB test. App. 302-332. On July 24, 1990, the United States Department of Labor published a proposed revised policy on use of the GATB test. App. 333-341. The purpose of the policy was to "inform the employment and training system of the Department of Labor Policy decision to discontinue the use of the GATB and all state agency or commercial tests which have adopted the GATB, in part or in whole, for use in the selection and referral of employment service registrants, or job training partnership act program participants to employer job openings." Nevertheless, the Job Service still utilized the GATB test for placement and referral, and only discontinued use of the test for a two-month period of time, immediately following the issuance of the directive. App. 280-282.

In September of 1990, the Defendant Job Service contacted employers who utilized the GATB test to lobby those employers to comment on the proposed regulations, specifically encouraging the employers to reach the United States Department of Labor as well as congressional representatives in order to persuade them to save the GATB test. The letter to the employer advisory council states in pertinent part that "without the GATB or a suitably approved federal alternate test, the Job Center Offices will have extreme difficulty in providing employers with job applicants that are proficient, productive, and predictive in job success." App. 344.

The GATB test has been analyzed as follows by Plaintiffs' expert, Robert Fitzpatrick, who submitted a report maintaining inter alia that:

> The plaintiffs took the GATB tests under improper conditions, which adversely affected their test scores and hence their chances of reemployment. The GATB tests tend to discriminate against older job applicants; a score adjustment to

> correct for this unfairness would have been appropriate, but was not made. The use of GATB scores as the sole or primary basis for hiring decisions in this case was poor personnel practice and operated to the detriment of the plaintiffs, since ability tests have limited usefulness in selecting experienced workers and since job experience information was available and highly relevant. The validity of the GATB for jobs such as those in the Vandergrift Plant has been exaggerated by the USES and the Pennsylvania Job Service, while the validity of work experience has been underestimated. Coaching on the GATB prior to retesting was futile and improper. App. 450-451.

In the wake of questions and criticism about the test, the decision about whether to use GATB is left up to the states. Some use it and some do not. The Pennsylvania decision was made by the Appellee in Harrisburg. App. 282. The age effects of this decision are particularly damaging to Pennsylvania workers. Pennsylvania ranks second among states in the nation in the percent of its population over the age of 65. Only Florida has a higher percentage. 1994 Pennsylvania Abstract, p. 19 Pennsylvania State Data Center, Penn State, Harrisburg. In Pennsylvania, 30.7% of the civilian labor force is 45 years of age and older as compared to the percentage for the United States as a whole of 28.8%. Annual Planning Information Report for South Central Pennsylvania, Fall 1992, Pennsylvania Department of Labor & Industry, Bureau of Research Statistics. It is also a momentous decision, because as the National Academy of Sciences (NAS) has found, people with low test scores rarely get referred to jobs. App. 290. Moreover, according to NAS the adverse effects of highly speeded tests on elder workers are known. App. 295-296. NAS found GATB to be too speeded. App. 336-337. Further, evidence of the age effect are seen in NAS tables and data. App. 311-318. In the Federal Register of July 24, 1990, the Department of Labor cautioned against using GATB for job screening. It noted that objections and fear of the test

could even cause low utilization of employment offices by the older job-seekers. App. 335-336. The Department of Labor indicates that screening should rely on more promising approaches such as biographical data methods. App. 336. Nevertheless, Pennsylvania continues to use GATB.

Evidence exists that this approach is not only callous to the needs of older citizens but cynical. Indeed in their inner councils, Job Service employees discuss and even joke about the age-effect of the test. For example, see Ravetto's deposition transcript wherein she reveals a discussion she had with fellow worker John Krisiak at work about their own GATB experience, attributing the difference in scores to age and laughing about it. App. 521.

The District Court did not find herein that Appellant steelworkers had insufficient evidence to support their claims of age discrimination against the Commonwealth. It held that the Commonwealth is immune from ADEA liability when it operates as an employment agency.

STATEMENT OF STANDARD OF REVIEW

This appeal is from an order granting summary judgment. Appellate review is plenary Kurz v. Philadelphia Elec. Co., 994 F.2d 136, rehearing denied (3rd Circuit 1993) cert denied 114 S.Ct. 622, 62 USLW 3394 (1993) Ambruster v. Unisys Corp., 32 F.3d 768, 777 (3rd Cir. 1994). This Court applies the same standard employed by the District Court and can affirm only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law US v. Capital Blue Cross, 992 F.2d 1270 (3rd Cir. 1993). As to the question of mootness, this issue is also considered under the plenary standard of review International Bhd. of Boilermakers v. Kelly, 815 F.2d 912, 914 (3d Cir. 1987).

SUMMARY OF THE ARGUMENT

The Commonwealth of Pennsylvania is not immune from liability under the Age Discrimination in Employment Act (ADEA) when it acts as an employment agency. Basic rules of statutory construction including, inter alia, considering the entire statutory language and not just one sentence thereof, support this conclusion. The intent of Congress was to abrogate the state's Eleventh Amendment immunity for ADEA purposes. The broad remedial purposes of the ADEA and an analysis of its analogous provisions in Title VII of the Civil Rights Act of 1964 support the conclusion that Eleventh Amendment immunity has been abrogated.

A federal court may award front pay in lieu of reinstatement against the Commonwealth for Constitutional violations actionable under 42 U.S.C. § 1983. The Eleventh Amendment precludes retroactive, not prospective relief. When reinstatement is not possible front pay may be awarded for the purpose of ending the Constitutional harm and preventing its reoccurrence in the future.

Appellant employees who have settled their age discrimination claims with the employers and the Union have not thereby mooted their claims against the non-settling Commonwealth. Appellants retain a personal stake in the outcome of these proceedings. Their General Aptitude Test Battery (GATB) results will continue to harm their employment careers in the future and injunctive relief can prevent that harm.

ARGUMENT

I. THE COMMONWEALTH IS NOT IMMUNE FROM LIABILITY UNDER THE ADEA WHEN IT ACTS AS AN EMPLOYMENT AGENCY

The District Court, citing its own opinion in Radeschi v. Commonwealth of Pennsylvania Department of Labor and Industry, 846 F.Supp. 416 (W.D. Pa. 1993), and disregarding the recommendation of its Magistrate Judge, held that the Commonwealth and its employees in their official capacities were immune from liability under the ADEA for conduct performed in administering the GATB test as an employment agency. While the District Court was correct in noting that Congress must make unmistakably clear its intent to abrogate Eleventh Amendment immunity, the Court erred in its analysis of Congressional intent. In the words of one court, "Unless Congress had said in so many words that it intended to abrogate the states' Eleventh Amendment immunity in age discrimination cases - and that degree of explicitness is not required, See, Fullilove v. Klutznick, 448 U.S. 448, 476-78, 100 S.Ct. 2758, 2773-75, 65 L.Ed.2d 902 (1980) -- it could not have made its intention to override the Eleventh Amendment clearer." Schloesser v. Kansas Department of Health and Environment, 766 F.Supp. 984, 990 (D. Kansas 1991) rev. without opinion, 991 F.2d 806 (1993). It is respectfully suggested that the District Court in reaching its conclusion herein ignored basic principals of statutory construction and the broad remedial purposes of the ADEA.

In 1983 the Age Discrimination in Employment Act survived a challenge by the state of Wyoming under the Tenth Amendment wherein Wyoming argued that the Act was an unconstitutional intrusion by the Federal Government which might threaten the separate and

independent existence of the states. In holding that the Act was constitutional, the Supreme Court also held that the Amendments to the Act which extended age discrimination prohibitions to state governments were a valid exercise of Congressional power under the Commerce Clause. EEOC v. Wyoming, 460 U.S. 226, 243, 103 S.Ct. 1054, 1064, 75 L.Ed.2d 18 (1983). However, the Supreme Court left open the question, not essential to its holding, as to whether the amendments were also a valid exercise of Congress's power under Section V of the Fourteenth Amendment.

This question relates directly to the issue of Congressional abrogation of Eleventh Amendment immunity. Following the Supreme Court's decision in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), subsequent case law has indicated that for purposes of establishing that Eleventh Amendment immunity has been abrogated by Congress, two conditions must be satisfied. The first is that the Age Discrimination in Employment Act must have been enacted under power granted by the Constitution to Congress to regulate activities of the states, such as the power to regulate interstate commerce, or the power to enforce the prohibitions of the Fourteenth Amendment. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). The second condition is that Congress must have made unmistakably clear in the Act that it intended to hold states liable for violating the Act. Atascadero State Hospital v. Scanlon, supra, 473 U.S. at 242, 105 S.Ct. at 3147; Dellmuth v. Muth, 491 U.S. 223, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989).

Numerous courts which have considered the issue have reached the conclusion that the states' Eleventh Amendment immunity has been abrogated by the ADEA. Davidson v.

Board of Governors of State Colleges and Universities, 920 F.2d 441 (7th Cir. 1990). Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). Swanson v. Department of Health State of Colorado, 773 F.Supp. 255 (D. Col. 1991); Schloesser v. Kansas Department of Health and Environment, 766 F.Supp. 984 (D. Kan. 1991); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983); Grossman v. Suffolk County District Attorney's Office, 777 F.Supp. 1101 (E.D. N.Y. 1991); and in this circuit Reiff v. Philadelphia County Court of Common Pleas, 827 F.Supp. 319 (E.D. Pa. 1993). The District Court in Reiff noted:

> With respect to the plaintiff's ADEA claim, another federal claim, the defendant seems to acknowledge that both of the conditions for overriding sovereign immunity are met. Congress clearly intended to lift the Eleventh Amendment bar when it passed the ADEA ... The act, as amended in 1974, provides that any employer who violates the age discrimination law is liable for any legal or equitable damages caused by the discrimination. 29 U.S.C. § 626(b)(c). The statute defines "employer" to include "a state or political subdivision of a state." 29 U.S.C. § 630(b). Congress has clearly expressed its intention to hold states liable for violations of the ADEA.

Reiff v. Philadelphia County Court of Common Pleas, 827 F.Supp. 319, 323 (E.D. Pa. 1993). Not only is the statutory language unmistakably clear, but the legislative history of the 1974 Amendments to the ADEA support this conclusion as well. The Fourth Circuit conducted an exhaustive review of this legislative history, Arritt v. Grisell, 567 F.2d 1267, 1270 ftnt. 11 (4th Cir. 1977) and concluded, "In 1972 Congress amended Title VII to extend coverage to the states as employers, and in 1974 Congress similarly amended ADEA." Arritt v. Grisell, supra. Indeed, in the District Court, the Commonwealth herein has not argued that the ADEA does not extend to the Commonwealth as an employer, but rather has argued that the same 1974 Amendments to the Act carved out an exception when states operate as employment services.

The definitional language of the ADEA which was amended by Congress in 1974 is as follows:

> (a) the term "person" means one or more individuals, partnerships, associations, labor organization, corporations, business trusts, legal representatives, or any organized group of persons.
>
> (b) the term "employer" means a person engaged in an industry affecting commerce who has ~~25 or more employees~~ 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than 50 employees shall not be considered employers. ~~The term also means that any agent of such a person, but such terms do not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.~~ The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States;
>
> (c) the term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such person; but shall not include an agency of the United States ~~or an agency of a State or political subdivision of State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.~~
>
> (f) ~~the term "employee" means an individual employed by an employer."~~ the term "employee" means an individual employed by an employer except the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political

subdivision.[4]

ADEA, 29 U.S.C. 630 (a)(b)(c)(f) as affected by amendments in 1974.

A review of this statutory language makes clear that Congress deleted in subsection (b) the exclusion of state from the definition of "employer," and redefined "employer" to include states or political subdivisions. Also, in subsection (f) the term "employee" was specifically amended so as to exempt state employees who were elected public officials or policy making level officials from the coverage of the Act. When subsection (c) was amended, the previous exclusion for "agencies of states or political subdivisions of states" was deleted, but the exclusion for "agencies of the United States government" was retained.

Perhaps the first rule of statutory construction which has a bearing on the issue at hand is the requirement that interpretation "[a]t a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." United States Nat'l Bank v. Independent Ins. Agents, Inc., 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402 (1993). "No more than isolated words or sentences is punctuation alone a reliable guide for the discovery of a statute's meaning. Statutory construction 'is a holistic endeavor.'" United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988), US National Bank of Oregon, supra., at 113 S.Ct. 2173. This holistic endeavor contains both a caution and a requirement that an analysis of a statute not distort its true meaning:

> [T]ext consists of words living "a communal existence" in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in

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[4] *The language stricken was deleted and the highlighted language was added by the 1974 Amendments.*

> their aggregate take[ing] their purport from the setting in which they are used." NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941). Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. United States v. Heirs of Boisdore, 49 U.S. (8 How) 113, 122, 12 L.Ed. 1009 (1849).

United States Nat'l Bank v. Independent Ins. Agents, Inc., supra., at 113 S.Ct. 2182 (some citations omitted). The District Court herein, unfortunately, committed the exact error of distorting a statute's true meaning by looking to a single sentence, rather than the provisions of the whole law, its objects and policy. A review of the 1974 amendments makes it quite clear that in 1974 Congress was faced with an Act which prohibited age discrimination, but exempted states from coverage. Congress amended that Act with the clear intention to extend the prohibitions against age discrimination to the states. It is hardly conceivable that having made that decision, Congress intended to exempt from the purview of the Act those state agencies, and only those agencies, which deal with employment services. It is a court's duty to interpret statutory language to find an interpretation which can most fairly be said to be harmonious with the scheme and general purposes that Congress manifested. Commissioner v. Engle, 104 S.Ct. 597, 464 U.S. 206, 78 L.Ed.2d 420 (1984). The design of the statute, the language of the whole, and the object and policy of the statute are of critical importance. Crandon v. U.S., 110 S.Ct. 997, 1001, 494 U.S. 152, 108 L.Ed.2d 132 (1990).

It is respectfully submitted that it would be an absurd result to assume that Congress intended to exempt state employment services, such as the Appellee's Job Service herein, from the prohibitions against age discrimination, while clearly manifesting an intention to extend the Act's coverage to the states. Such an absurd result is to be avoided if at all

possible in statutory construction. United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). The result reached by the District Court herein is that state employment agencies, following the amendments in 1974 of the ADEA, were intended by Congress to enjoy a special immunity, differing from (1) states as employers, (2) from private employment agencies, and (3) from state employment agencies sued as employers. This simply could not have been the intent of Congress. Congress never intended such a strange and unjustifiable special immunity proposed by the Commonwealth. It is clear the intent of Congress, both under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq., and under the ADEA, is to impose full liability on state employment agencies.

Courts have traditionally interpreted the provisions of the ADEA by looking to interpretations of Title VII of the Civil Rights Act of 1964. "In Hodgson v. First Federal Savings & Loan Association, 455 F.2d 818, 820 (5th Cir. 1972), the United States Court of appeals for the Fifth Circuit stated that with "a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 621 (1985). Citing a Title VII holding in Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229 (1984), the Supreme Court has said: "This interpretation of Title VII of the Civil Rights Act of 1964, ... applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII." Thurston, 105 S.Ct. at 621. See also Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58, 99 S.Ct. 2066 (1978) (Because of the close relationship of Title VII and the ADEA, case law developed under

Title VII has frequently been relied on as authority to interpret the ADEA.) See also Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

Like the ADEA, Title VII includes within its substantive scope "employers," "employment agencies," and "labor organizations." 42 U.S.C. §2000e. In a case under Title VII, the Fifth Circuit held that a state employment agency was fully liable for backpay claims after Title VII violations had been found, even though it was only capable of providing the potential for jobs, rather than actual jobs, and even though the probability that a non-discriminatory referral would result in a job was usually less than 100%. Pegues v. Mississippi State Employment Service, 899 F.2d 1449 (5th Cir. 1990).[5]

In general, courts have found that state employment services are subject to Title VII proscriptions for discriminatory practices. See, for example, Johnson v. Louisiana State Employment Service, 301 F.Supp. 675 (W.D. LA. 1968). See also Hill v. Mississippi State Employment Service, 54 F.E.P. 997 (5th Cir. 1990). (State employment agencies are subject to Title VII, but held in this case not to be guilty of the violations charged.)

That Congress did not mean to insulate state employment agencies from liability for discriminatory practices, is seen in the language of Title VII itself. Section 706(g), 42 U.S.C. §2000e-5(g), provides in part:

> If the Court finds that the respondent has intentionally engaged in .... an unlawful employment practice ... the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay payable by the employer, employment agency, or labor organization, as the case may be,

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[5] The Pegues court also found that the Eleventh Amendment does not bar an award of monetary relief against a state employment agency.

> responsible for the unlawful employment practice, or any other equitable relief, as the Court deems appropriate.

In addition to showing no intent to shield employment agencies from a backpay award, it should also be noted that Congress viewed an award of backpay as part and parcel of an injunctive remedy.

In light of the fact that Title VII clearly provides for monetary awards against state employment agencies, there would seem to be no policy reason for shielding a state employment agency from such damages under the ADEA. Why should a plaintiff discriminated against on the basis of sex, for example, by a state employment agency be afforded a different range of remedies than those accorded to a plaintiff discriminated against on the basis of age? A conclusion that a difference was intended must be backed up by clear evidence of Congressional intent.

Since the substantive provisions of the ADEA were taken directly from those of Title VII, it is not surprising that the definition of "employment agency" in both acts is similar.[6] It is important to note that both Title VII and the ADEA were amended within a short time

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[6] The definition of employment agency for Title VII is as follows:

> The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

The ADEA defines "employment agency" as follows:

> The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

of each other to change their definitions of employment agency in a similar fashion.

Although Appellants have found no informative legislative history to clarify Congressional intent with respect to the Amendments to the ADEA, such clarification was probably not thought necessary by Congress, since its purposes had been made clear with respect to the similar change made to Title VII a short time before. As noted by the court in Pegues v. Mississippi State Employment Service, 22 F.E.P. 389 (N.D. Miss. 1978) aff'd. in part rev'd. in part 699 F.2d 760 (5th Cir. 1983), the 1972 amendments to Title VII, 42 U.S.C. §2000e(c), deleted coverage of the United States Employment Service, "while retaining coverage of state employment service agencies." Id. at 390. The Court stated that "Congress was aware of the need for continued coverage of state employment service agencies." Id. The legislative history supporting this notion can be found in House Report 92-238 (CIS 71-H343); House Report 92-899 (CIS 72-H343-2); and Senate Report 92-415 (CIS 71-S534-17).

The legislative history with respect to the original version of the ADEA shows that the term employment agency was meant to "include the United States Employment Service and the system of State and local employment services." House Report No. 805 accompanying H.R. 130054, enacted as P.L. 90-202.

The language in the present ADEA definition "but shall not include an agency of the United States," reveals that the term "employment agency" was meant to encompass governmental entities (otherwise the restriction to "persons" in the definition would have excluded state agencies). It should also be noted that the 1974 amendment deleted an express exclusion of "an agency of a state" from the definition of employment agency, and therefore

the intent to include state employment agencies can be inferred.

The express deletion of coverage, under the definition of "employment agency," for the United States Employment Service (by the 1972 Amendment to Title VII, 42 U.S.C. §2000e(c), and the 1974 Amendment of ADEA §630(c)) was probably a response to situations like that presented in Pegues v. Mississippi State Employment Service, 22 FEP 390 (N.D. Miss. 1978). In Pegues, a Title VII case, the Secretary of Labor was joined by the Mississippi State Employment Service as a party defendant because of his position as head of the United States Employment Service, on the theory that the state employment agency was wholly funded in its relevant operations by federal funds and therefore the federal defendant should be held liable for any awards of backpay, attorneys' fees and damages that might be awarded. The Pegues court noted that the 1972 Amendment eliminated coverage of the United States Employment Agency "while retaining coverage of state employment service agencies" and said that it was "inconceivable" that Congress intended to make the federal government liable "for all the actions of agencies of State government" absent express provision therefor in the statute. Pegues at 390-391. Thus retention of coverage of state employment agencies, while excluding coverage of the United States Employment Agency, can be seen as the result of a prudential concern with a potential involvement of the federal agency in every suit against a state employment agency, even where, as in Pegues, the federal agency was not alleged to have participated in discriminatory conduct.

It is important to note that Commonwealth can advance no policy reasons for its argument that claims are not available under the ADEA against a state employment service. In general, actions for backpay under the ADEA are not barred by the Eleventh Amendment.

Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983); Davidson v. Board of Governors of State Colleges & Universities, 920 F.2d 441 (7th Cir. 1990). Similarly, the Eleventh Amendment does not bar awards of monetary damages against the state in Title VII actions. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In Policy Statement No. 915.053, May 11, 1990, the EEOC set forth its opinion that there may be a monetary award against a "labor organization" under the ADEA. The EEOC interpreted the ADEA to allow for monetary relief to be obtained against a "labor organization," when not acting in its capacity as an "employer." In reaching this conclusion, the EEOC rejected an argument analogous to that made by the Commonwealth herein. The EEOC opinion states as follows:

> The legislative history [of the ADEA] strongly indicates that Congress' reasons for incorporating FLSA enforcement procedures into the ADEA were not based upon an analysis of any substantive purpose or limitations underlying the FLSA remedial provisions, but rather upon administrative ease and efficiency. By fitting the ADEA into the FLSA mode, Congress could utilize and establish an experienced bureaucracy, and better ensure the prompt and effective enforcement of the Act.
>
> Secretary of Labor W. Willard Wirtz, testifying in favor of the Administration's version of the bill providing for administrative agency level adjudication, but containing similar substantive prohibitions against discrimination by labor organizations, expressly stated that labor organizations could be held liable for backpay. See Age Discrimination in Employment hearings on H.R. 3651, H.R. 3768, and H.R. 4221 before the House Committee on Education and Labor, General Subcommittee on Labor, 90th Cong., 1st Sess. 12 (1967).

The EEOC argues that in addition to the legislative history of the ADEA, the broader language of the ADEA pertaining to available remedies must be taken into account. The EEOC opinion points out that the ADEA enforcement section contains a provision not included in the FLSA, namely:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. 29 U.S.C. §626(b).

The analysis by the EEOC of the Congressional intent underlying inclusion of this provision is as follows:

> By including this broad language, Congress obviously intended some modification to FLSA remedies and procedures. See, Lorillard, 434 U.S. at 581 (stating that by including the above-cited provision, Congress made clear its intent to allow private individuals to seek injunctive relief under the ADEA, a remedy not available under the FLSA). 'The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an employee for the economic injury sustained by him.' Koyen v. Consolidated Edison, 560 F.Supp. 1161, 1168 (S.D.N.Y. 1983) (analysis supporting the granting of front pay under the ADEA despite lack of a similar remedy under the FLSA).
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> From the inclusion of this broad language, it can be inferred that Congress recognized that the remedial provisions of the FLSA were not perfectly suited to the age discrimination context, and thus gave the courts discretion to fashion appropriate relief beyond the explicit dictates of the FLSA [Text of footnote 6: The original purposes and context of the FLSA differs significantly from those of the ADEA. The intent of the FLSA is to guarantee a living wage and decent working conditions to those workers who did not have the ability to organize and obtain minimum wages and maximum hours through collective bargaining. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937).] See S. Rep. No. 723, 90th Cong., 1st Sess. 15-16 (1967) (individual views of Mr. Javits) (noting that the enforcement provisions of the FLSA had been incorporated in the bill, "with appropriate modifications necessary to accommodate them to the purposes of this legislation.")
>
> Failure to hold a labor organization liable for monetary damages will undercut the ADEA's goal of eliminating arbitrary age discrimination in employment. Injunctive remedies, operating alone, are an insufficient deterrent to age discrimination in that past acts of discrimination are left unremedied. In order to fully effectuate the purposes and goals of the ADEA, labor organizations should be held liable, as appropriate, for the full range of legal and equitable remedies available under the ADEA.

The Supreme Court has held that administrative interpretations of statutes by the enforcing agency are entitled to great deference. Griggs v. Duke Power Company, 401 U.S. 424, 434 (1971) (referring to EEOC guidelines and interpretation of Title VII). See also Orzel v. Wauwatosa Fire Department, 697 F.2d 743, 748 (7th Cir. 1983) (EEOC interpretation of ADEA). The Secretary's ruling should be given great weight in interpretation of the ADEA. Hart v. United Steelworkers of America, 350 F.Supp. 294 (W.D. Pa. 1972). The positions of employment agencies and labor organizations under the ADEA are not strictly analogous, but the technical legal arguments advanced to deny a remedy against both categories of defendants are almost identical.

As is discussed above, affirming the District Court herein entails reaching a conclusion that state "employment agencies," unlike state "employers" and indeed state "employment agencies" sued as employers, exist on a plane above the reach of liability under the ADEA and that they are free to discriminate on the basis of age with no fear of repercussions. State employment agencies would be free to engage in a practice of refusing to refer older people for jobs in conspiracy with employers, free to administer tests which are discriminatory against older people and which are unrelated to the jobs sought, with impunity. It seems clear that this was not the intent of Congress in enacting the ADEA, because it was the ADEA's stated purpose "to promote employment of older persons based on their ability rather than age," and "to prohibit arbitrary age discrimination in employment." ADEA §621(b).

The ADEA is remedial in nature, Surrisi v. Conwed Corp., 510 F.2d 1088 (8th Cir. 1975), and remedial statutes are to be liberally construed in favor of their beneficiaries.

Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765, 99 S.Ct. 2066, 2076 (1979) (Blackmun J., concurring). Jackson v. Alcan Sheet & Plate, 462 F.Supp. 82 (N.D.N.Y. 1978). Moreover, statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2nd Cir. 1914) (opinion of Learned Hand, J.).

It should finally be noted that, under its own law, the Commonwealth recognizes the liability of employment agencies, including public ones. See the Pennsylvania Human Relations Act (PHRA), 43 P.S. §951 et seq. The scope of the Pennsylvania Human Relations Act extends to an "employment agency," (§954(e)) which is defined as a "person", which, in turn, includes "the Commonwealth of Pennsylvania, and all political subdivisions, authorities, boards and commissions thereof." The Pennsylvania Human Relations Act sets forth numerous prohibitions relating to employment agencies, including that set forth in §955(f):

> [It shall be an unlawful discriminatory practice] for any employment agency to fail or refuse to classify properly, refer for employment, or otherwise to discriminate against any individual because of his race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability....

In addition, the remedies available under the PHRA include an award of backpay and "actual damages, including damages caused by humiliation and embarrassment" (§959(f)(1)) and attorneys fees and costs (§959 (f.2)).

II. THE EQUITABLE REMEDY OF FRONT PAY IN LIEU OF REINSTATEMENT FOR VIOLATIONS OF APPELLANTS' CONSTITUTIONAL RIGHTS IS NOT BARRED BY THE ELEVENTH AMENDMENT

The steelworkers in this case brought suit against the Commonwealth not only for violations of the Age Discrimination in Employment Act but also raised a due process and equal protection challenge to the actions of the Commonwealth pursuant to 42 U.S.C. § 1983. Unlike the steelworkers challenge to the age discriminatory aspects of the GATB test, the Constitutional claims relate to the non-relational aspects of the GATB test. The test does not measure those skills which were required by the jobs which existed at the steel plant. Appellants' expert Robert Fitzpatrick in his analysis of GATB noted in part "[it] is clear that, although the GATB has some validity for most jobs, the USES and the Pennsylvania Job Service exaggerate the degree of validity and the scope of applicability of the GATB. There is no direct evidence, and only weak indirect evidence, to connect the GATB scores with success at jobs in the Vandergrift plant." App. 446.

Also the fact that Appellants were experienced steelworkers, rather than qualifying them as particularly suited candidates for jobs in the plant, actually disqualified them as a result of the operation of GATB. Dr. Fitzpatrick concluded in the same report, "the use of GATB's scores as the sole or primary basis for hiring decisions in this case was poor personnel practice and operated to the detriment of the Plaintiffs, since ability tests have limited usefulness in selecting experienced workers and since job experience information was available and highly relevant. "The validity of the GATB for jobs such as those in the Vandergrift plant has been exaggerated by the USES and the Pennsylvania Job Service, while the validity of work experience has been underestimated." App. 451. The challenges which the steelworkers raised to these aspects of GATB were not challenges based upon the age discriminatory aspects of the test, but rather claims that the test does not measure those skills

related to the employment for which it was used, and that using the test to the exclusion of utilization of referral for jobs based upon the Appellants' experience as steelworkers, created a situation wherein prior steelworking experience, which should have qualified Appellants for the employment that was being offered at Allegheny Ludlum, actually operated as a bar to Appellant's becoming employed.

The steelworkers herein suffered discrimination which was markedly similar to that raised by the plaintiffs in a § 1983 action who attacked the constitutionality of a minimum score requirement imposed by the Georgia state board of education via the use of the National Teacher Examination (NTE). The challenge brought by those plaintiffs was an equal protection challenge Georgia Association of Educators, Inc. v. Nix, 407 F.Supp. 1102 (N.D. Ga 1976). That court noted "The general principle of equal protection analysis is that a state may accord different treatment to persons placed by it in different classes; however, the classifications of persons to be accorded the different treatment cannot be made upon arbitrary criteria. Arbitrariness can be measured by the degree of correlation between the standard which is used to classify (here the NTE score of 1225) and the valid objective." Georgia Association of Educators, Inc. v. Nix, supra at 1108. That Court went to frame the question as follows:

> The question for the court in this instance is whether or not the defendants have established a rational relationship between the minimum NTE score required and the stated purpose of the test and the six year certificate.

Georgia Association of Educators, Inc. v. Nix, supra at 1108-1109. That Court noted that the obtaining of the minimum score was the sine qua non for consideration, since if that score was not obtained, the applicant was not considered. In the instant case the Appellant

steelworkers have pled, offered evidence on the record and can prove at trial that obtaining a sufficient score on the GATB test was the sine qua non for referral for jobs at Allegheny Ludlum. Because the GATB test did not measure the most outstanding credentials of the Appellants, that they were experienced steelworkers, the GATB was an arbitrary criterion applied to a classification of persons by state action.

> As noted by the Third Circuit in Bello v. Walker, the "touchstone of due process is the protection of the individual against arbitrary action of the government." Bello, 840 F.2d at 1129, quoting Davidson v. Cannon, 474 U.S. 344, 353, 106 S.Ct. 668, 673, 88 L.2d 677 (1986). The test for determining whether government conduct is "arbitrary" is whether the law or action in question is rationally related to a government interest. See e.g. Bannum v. City of Memphis, 666 F.Supp. 1091, 1093 (W.D. Ten. 1986). While the existence of bias, bad faith, or improper motive may be an excellent indicator of arbitrary government conduct, we do not believe that the absence of such of improper motive, ipso facto renders the government action in question rational and non-arbitrary.

Epstein v. Whitehall, 693 F.Supp. 309, 313 (E.D. Pa 1988).

The District Court in its memorandum opinion accepted, without explicitly deciding, that the Steelworkers had stated a cause of action for constitutional violations under 42 U.S.C. § 1983, but held that their challenges were entirely foreclosed by the Eleventh Amendment. The Court noted that prospective injunctive and declaratory relief was available against the Commonwealth official and employees in their official capacities. Ex parte Young, 209 U.S. 123 (1908), but held "This exception does not include "front pay" in lieu of the equitable remedy of reinstatement because, although reinstatement itself might not be precluded by the Eleventh Amendment, see Clyde v. Thornberg supra, front pay is clearly payment of damages for past wrongs and, as such, may not come out of the state treasury according to Edelman and its progeny. See also Green v. Mansour, 474 U.S. 64, 68 (1985)

(while the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent or end a continuing violation of federal law even if it may cost the state some money, the Supreme Court has refused to extend that reasoning to claims for retrospective relief designed to compensate a plaintiff for past violations); Municipal Authority of Bloomsburg v. Commonwealth of Pennsylvania, Department of Environmental Resources, 496 F.Supp. 686, 690 (M.D. Pa. 1980) (the label attached to plaintiff's theory [of relief] is of no importance. If the relief requested requires the payment of state funds to compensate the plaintiffs for past actions subsequently found to be unlawful, that relief is barred by the Eleventh Amendment.") cf. Hutto v. Finney, 437 U.S. 678 (1978). App. 56-57.

While the Eleventh Amendment by its terms explicitly bars only suits against a state by citizens of another state, the United States Supreme Court has consistently held that an unconsenting state is immune from suit brought in federal court by her own citizens. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed 842 (1890); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct 1614, 36 L.Ed.2d 251 (1973); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In its landmark holding in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908), the United States Supreme Court first articulated that relief was available in § 1983 action against the state and which permitted in the Court's words "[t]he Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those for whom they were designed to protect." Edelman v. Jordan, supra at 415 U.S. at 664, 94 S.Ct. 1356, 39 L.Ed.2d ___.

> Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the Federal Courts seeking to

> enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather as merely as a shield, for those whom they were designed to protect. But in relief awarded in Ex parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

Edelman v. Jordan, supra at 415 U.S. 664, 94 S.Ct. 1356, 39 L.Ed.2d ___. In Edelman the Supreme Court held that the Eleventh Amendment did constitute a bar to the retroactive award of past public assistance benefits which had been wrongfully withheld from persons by a state in violation of certain provisions of the Social Security Act.

The Court in Edelman was careful to note that it was not because of the financial impact which the retroactive award of public assistance benefits might have on the State that the Court found that the Eleventh bar had not been overcome, but rather because of the retroactive nature of the award. Edelman stands firmly for the proposition that only prospective relief may be awarded in compliance with Ex parte Young. To simplify Edelman as a holding which allows equitable relief, but not damages under the Eleventh Amendment, is to misread Edelman. The financial impact on the state was recognized by the Edelman Court as a possible ancillary effect of permissible prospective relief.

> Later cases from this court have authorized equitable relief which has probably greater impact on state treasuries than did that awarded in Ex parte Young. In Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified participants who were aliens. In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), New York City welfare officials were enjoined from following New York state procedures which authorized termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more

> likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such ancillary effect on the state treasury is permissible and often an inevitable consequence of the principle in announced in Ex parte Young supra."

Edelman v. Jordan, at 415 U.S. 667, 668, 94 S.Ct. 1357-1358, 39 L.Ed.2d ___. The Supreme Court, in interpreting Edelman, has noted the Edelman prospective versus retroactive distinction. "In particular, Edelman held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102-103, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 ___ (1984).

The Pennhurst Court analyzed the theory behind Ex parte Young, noting that the theory of that case was that an unconstitutional enactment is void and therefore does not impart to the officer any immunity from responsibility to the supreme authority of the United States. Since the state could not authorize the action, the officer was stripped of his official or representative character, and subjected in his person to the consequences of his individual conduct. Pennhurst supra at 465 U.S. 103, 104 S.Ct. 909. This underlining theory of the Ex parte Young highlights the irrelevancy of the damages analysis. The supreme authority of federal law enables a federal court to fashion equitable remedies to stop violations of federal law and prevent violations from occurring in the future. This theory also explains why federal-courts' decrees are required to directly address and relate to the Constitutional violations themselves. "Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation... or if they are

imposed upon governmental units that were neither involved in nor affected by the constitutional violation... but where, as here a constitutional violation has been found the remedy does not "exceed" the violation if the remedy is tailored to cure the "condition that offends the constitution." Milliken v. Bradley, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745, ___ (1977). In the sequel to Edelman, the Supreme Court reiterated that a federal court, consistent with the Eleventh Amendment, may enjoin a state's officials to comport their future conduct to the requirements of federal law even though such a injunction may have an ancillary effect on the state's treasury. Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358, ___ (1979). "The distinction between that relief permissible under the doctrine Ex parte Young and that found barred in Endelman was the difference between prospective relief on the one hand and retrospective relief on the other." Quern v. Jordan supra. at 440 U.S. 338, 99 S.Ct. 1143. More recent guidance from United States Supreme Court has suggested an examination of the substance rather than the form relief sought.

> For Eleventh Amendment purposes, the line between permitted and prohibited will often be indistinct: '[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted by Ex parte Young will not in many instances be that between day and night' ... In discerning on which side of the line that a particular case falls, we look to the substance rather than the form of the relief sought ... and will be guided by the policies underlying the decision in Ex parte Young.

Papasan v. Allain, 478 U.S. 265, 279, 106 S.Ct. 2932, 2940-2941, 92 L.Ed.2d 209, ___ (1986).

Turning then to the substance, rather than the form, of the relief sought herein. The steelworkers filed this action originally against Allegheny Ludlum Corporation, the United

Steelworkers of America and the Commonwealth, and requested at the very inception of this matter that the Court enter an order requiring that they be made whole by being reemployed by Allegheny Ludlum in suitable positions. App. 102-103. The Eleventh Amendment would not bar an order of the District Court which required the Commonwealth to reemploy or reinstate the steelworkers herein. Laskaris v. Thornburgh, 661 F.2d 23 (3rd Cir. 1981). In this context a reinstatement operates as part of a "make whole" remedy under 42 U.S.C. § 1983 because such make whole relief operates to terminate the unconstitutional conduct and prevent that conduct in the future. If the Commonwealth controlled steelmaking jobs, the steelworkers herein could be reinstated in steel making jobs by the Commonwealth. The District Court believed it had the power to order such reinstatement and the Court was correct in light of the Eleventh Amendment teachings discussed herein. However, the Commonwealth is not able to reemploy the steelworkers herein who were originally employees, not of the Commonwealth, but of a private steel company. When reinstatement is not possible or not feasible this Court has recognized in other contexts, most particularly under the Age Discrimination in Employment Act, that front pay may be awarded in lieu of reinstatement as an "equitable remedy." Maxfield v. Sinclair International, 766 F. 2d 788 (3rd Cir. 1985); Blum v. Witco Chemical Corporation, 829 F.2d 367 (3rd Cir. 1987). As the Third Circuit recognized in the ADEA context, once the equitable decision has been made by the court that reinstatement is not feasible, front pay should be awarded in lieu of reinstatement. The amount of damages available as front pay is a jury question. Blum v. Whitco supra at 374 at footnote 4. The right to recover front pay in a § 1983 context arises from the presumption that a constitutionally impermissible employment action should result

in the entitlement to reinstatement. Jackson v. City of Albuquerque, 890 F.2d 225, 233 (10th Cir. 1989).

The steelworkers herein alleged that GATB posed an unconstitutional bar to their employment. This bar harmed them in that they did not receive jobs with Allegheny Ludlum. It is permissible for a federal court to stop that harm by ordering their reinstatement. In fact reinstatement it is constitutionally required. Since that form of equitable relief is not available, the equitable remedy of front pay, which is available, may be constitutionally awarded. In this regard it is irrelevant that this equitable relief will have the ancillary effect of requiring the Commonwealth to make expenditures from the state's treasury. What is relevant is that this form of equitable relief will end the unconstitutional conduct and prevent it from occurring in the future.

III. APPELLANTS CLAIMS FOR INJUNCTIVE RELIEF UNDER 42 U.S.C. § 1983 ARE NOT MOOT

Having concluded that Appellants could not establish ADEA liability, or liability for front pay under 42 U.S.C. § 1983, the District Court finally determined that the only relief it could award was enjoining the Commonwealth's continued use of the GATB. This it refused to do on the grounds of mootness. The portion of District Court's order recommending dismissal of Plaintiffs' claims for injunctive and declaratory relief on the basis of mootness is premised upon the Court's findings set forth in its opinion:

> [w]here the settlement effectively supplies all the relief which plaintiffs had sought, a settlement with some defendants represents a sufficient change of circumstances to render the case against the remaining defendants moot. S-1 v. Spangler, 832 F.2d 294 (4th Cir. 1987). App. 62.

> For the foregoing reasons, this court has no jurisdiction over the remaining claims in this case if, as the court strongly suspects, the sealed settlement agreement provides all the relief requested and pursued in this case which concerns the hiring of former United States Steel-Vandergrift employees over the age of forty at the Allegheny Ludlum facilities and the Commonwealth Defendants' use of the GATB's at the Job Service in Vandergrift to determine preferences for hiring members of the plaintiff class ... The plaintiffs have no standing to seek to vindicate the right of third-parties who might be adversely affected by continued administration of GATB. App. 63-64.

The District Court properly identified the two areas of inquiry relevant to its consideration; whether the settlement agreement provided for the relief requested concerning the hiring of the Appellants, and whether the settlement agreement provided for the relief requested regarding the Commonwealth's use of the GATB. However, in conducting that inquiry the District Court reached an incorrect result. It is respectfully submitted that this Court's review of the settlement agreement will reveal that while that agreement did in fact resolve the issue of the hiring it in no manner resolved the issue of the Commonwealth's use of GATB.

The Settlement Agreement provides for a monetary settlement of Appellants' claims and for employment by Allegheny Ludlum of four of the Appellants, Farah, Morda, Poskus and Stewart, and the waiver by the other Appellants of any rights to seek employment with Allegheny Ludlum in the future.

The Agreement also specifically provides:

> The Plaintiffs specifically reserve the right to make, raise and pursue existing claims against the Commonwealth Defendants, other than the Company Releasees and the Steelworkers Releasees, and reserve the right to claim that the Commonwealth Defendants, and not Company Releasees and/or the Steelworkers Releasees, are liable to the Plaintiffs for damages resulting from Allegheny Ludlum's purchase and operation of, or hiring decisions with regard to, the former United States Steel plant at Vandergrift, Pennsylvania, and relating to any and all other matters asserted in the Actions. App. 19.

Only this provision set forth in paragraph 18 of the Agreement was relevant to the issue of concern to the District Court which was whether the Settlement Agreement resolved Appellants' claims related to the Commonwealth's use of the GATB at the Job Service in Vandergrift to determine preference for hiring members of the Appellants' class. Clearly, not only did the Settlement Agreement not resolve those claims, but the Appellants specifically reserved to themselves the right to make, raise and pursue all of their existing claims against the Commonwealth.

The claims which existed against the Commonwealth at the time of the execution of the Settlement Agreement, February 4, 1993, and which were preserved to be raised against the Commonwealth, included those claims which had been raised in the original Complaint, Amended Complaint, and Supplemental Amended Complaint. App. 68, 140. The Complaint requests that the Court award appropriate class wide relief and further requests that the Court monitor the offices of the Commonwealth Job Services which serve Allegheny Ludlum's Vandergrift, West Leechburg, and Brackenridge plants for a period of at least one year with regard to the treatment of older workforce members. App. 102-103. The Amended Complaint and the Supplemental Amended Complaint repeated those requests. App. 165-167.

In addition, each prayer for relief requested that the Court grant such other relief as appears reasonable and just and as the Court deems appropriate. Thus, jurisdiction was invoked since the inception of this action requesting both declaratory and injunctive relief, and the District Court had the power, and had been requested, to both declare the administration of the GATB test unlawful and enjoin the Commonwealth from any further

administration of it. 29 U.S.C. §§ 2001, 2002, 28 U.S.C. § 1343. Fisher v. Dillard University, 499 F.Supp. 525 (E.D. LA 1980); Padover v. Gimbel Brothers, 412 F.Supp. 920 (E.D. Pa. 1976).

However, the District Court declined to exercise jurisdiction over these claims of Appellants and in the District Court's words: "For the foregoing reasons, this court has no jurisdiction over the remaining claims in this case if, as the court strongly suspects, the sealed Settlement Agreement provides all the relief requested and pursued in this case which concerns the hiring of former United States Steel-Vandergrift employees over the age of forty at the Allegheny Ludlum facilities and the Commonwealth Defendants' use of the GATB's at the Job Service in Vandergrift to determine preference for hiring members of the plaintiff class." App. 63-64. (emphasis added). The Court's suspicion that the Appellants, in settling their claims with the Allegheny Ludlum and the Union, received the relief they requested regarding hiring by Allegheny Ludlum was correct in that the Settlement Agreement provides that four Appellants would be hired and the remaining Appellants waived their right to employment at Allegheny Ludlum. However, the District Court's apparent conclusion that the Settlement Agreement dealt with the issue of the Commonwealth's use of the GATB at the Job Service at Vandergrift to determine preference for hiring was incorrect.

The Settlement Agreement does not mention the GATB test. Also, the Settlement Agreement includes specific provisions whereby the settling Defendants make it clear that they are not admitting any liability nor is there any indication that they have acknowledged any wrongdoing, either on their own behalf or in conjunction with the Commonwealth. Thus, the Settlement Agreement cannot be construed to have indirectly resolved any issues

related to the GATB test, while it did not resolve them directly.

During discovery Arthur H. Schwartz, the Commonwealth's Chief of Occupational Analysis and Testing was deposed. Dr. Schwartz indicated at his deposition that the GATB test is widely utilized by the Commonwealth. Approximately 50,000 persons are tested per year. At the time of Dr. Schwartz's deposition the GATB was being utilized by over 1,000 employers in Pennsylvania, including numerous steel companies. It is utilized by numerous Western Pennsylvania employers, including but not limited to the Port Authority of Allegheny County, General Electric, Sony, DuPont, Hertz Brothers, and General Mills. Dr. Schwartz also indicated that GATB is used widely by Fortune 100 companies, and nearly all of the automobile manufacturers. S. App. 92-93. Further, he testified regarding the GATB:

> They are not only considered for jobs at Allegheny Ludlum with this test, but they are considered for all other jobs based on this test, because these tests become part of their record. S. App. 92-93.

Appellants' GATB scores will follow them all of the days of their lives, and throughout the course of their working lives, unless Commonwealth's use of the GATB test and its scores is enjoined.

These facts are sufficient to establish that Appellants retain a personal stake in this litigation which satisfies the Constitutional component of the Article III mootness doctrine. U.S. Constitution, Article III, Section 2, Clause I. This personal stake requirement was recently discussed in Rosetti v. Shalala, 12 F.3d. 1216 (3rd Cir. 1993), and goes to the Constitutional component of the mootness doctrine.

> Article III does not permit a federal court to decide moot cases ... Part of the constitutional component of the mootness doctrine, is that the plaintiff maintain a "personal stake" in the outcome of the litigation ... As the Supreme Court stated in Gladstone, Realtors v. Village of Bellwood, 441 U.S.

> 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979), "In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury, as a result of the putatively illegal conduct of the defendant." The personal stake requirement ensures that courts will only decide disputes "presented in an adversary context and in a form historically viewed as capable of judicial resolution".... Additionally, the requirement follows from the often-repeated rule that under the case or controversy requirement, "federal courts are without power to decide questions that cannot affect the right of the litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d, 413 (1971). Thus, if developments occurring during the course of adjudication eliminate a plaintiff's personal stake in the outcome of a suit, then a federal court must dismiss the case as moot.

Rosetti v. Shalala, 12 F.3d 1216, 1223-1224 (3rd Cir. 1993) (some citations omitted) (footnotes omitted). Judge Lewis explained in Rosetti that the personal stake requirement has basically two components. The first is whether the Appellants could have suffered harm from the behavior, and the second is whether the Appellants can benefit from an injunction. The Appellants herein meet both of these personal stake criteria and neither the Settlement Agreement itself, nor the fact that Appellants either have accepted jobs with Allegheny Ludlum or have waived their right to employment at Allegheny Ludlum has remedied that harm. These Appellants may not be able to work in the future because their GATB results may preclude them from getting a job. The test results have become part of their records at the Job Service and cannot be changed. Employers are still utilizing GATB as a screening device because the Commonwealth continues to administer GATB tests. Even if Appellants could retake the GATB, which they cannot, they would have no relief because the GATB still discriminates on the basis of age. The Appellants wear their GATB results on their employment records much like a scarlet letter; only injunctive relief can remedy this harm.

The example of Appellant Farah's attempts to secure employment at Edgewater Steel

highlights this continuing harm. Farah was advised by Edgewater Steel that he must take the GATB in order to be considered by Edgewater for employment, but he was also advised by the Job Service that he could not retake the GATB. He was not hired by Edgewater. S. App. 103-108.

The personal stake requirement has been satisfied by litigants with much less at stake than the Appellant steelworkers herein. The requirement was satisfied by the petitioners in a patent infringement case who were concerned that their success in some unspecified future litigation might be impaired as a result of the court's ruling on the validity of the patent in question. Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 59 S.Ct. 860, 83 L.Ed. 1263 (1939). Creditcard holders had a sufficient personal stake in litigation to appeal the denial of class certification even though judgment had been entered in their favor by the court without their consent, and the case dismissed over their continued objection, because they retained an economic interest in class certification for the sole purpose of shifting the cost of the litigation from themselves to their opponents. National Bank v. Roper, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980).

In situations where the government or a governmental agency has sought injunctive relief, and in situations where injunctive relief is sought against a government or a governmental agency, courts have shown reluctance to hold that the effect of a settlement between the private parties in the action renders the matter moot. The Sixth Circuit has held that a coal mine operators settlement with complaining minors in those minor's actions seeking reinstatement, after allegedly having been terminated for seeking enforcement of mine safety regulations, did not moot the mine operators' claim that procedures of the

Federal Mine Safety and Health Review Commission, which permitted the Secretary of Labor to require that coal mine operators temporarily reinstate minors who had been terminated for seeking enforcement of mine safety regulations, was an unconstitutional deprivation of mine operator's due process rights. Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985).

The court noted:

> The court's power to grant injunctive relief was held to survive the discontinuance of the improper conduct, which was the origin of the proceeding. Rule 44 is still in force with its procedures intact. There is a reasonable expectation that the alleged wrongful and unconstitutional deprivation may be repeated. Furthermore, injunctive relief to prevent future deprivations of due process is appropriate and remains within the authority of the federal court to determine.

Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 699 (6th Cir. 1985). (emphasis added).

When the United States Secretary of Labor asked that fiduciaries of a defunct employee stock option plan be enjoined from violating the Employment Retirement Income Security Act, the Fifth Circuit held that the case was not mooted, even though the plan had been dissolved and none of the fiduciaries was currently a fiduciary under any plan covered by the Act. Noting a potential for recurrence of the illegal activity, the Court also placed emphasis on the continuing insistence by the fiduciaries that their discontinued activities were legal. Donovan v. Cunningham, 716 F.2d 1455, 1461 (5th Cir. 1983). That reasoning is directly applicable to the case herein. The Commonwealth has maintained throughout this proceeding that the GATB does not discriminate on the basis of age despite overwhelming evidence to the contrary, and despite directives from the Federal Government to discontinue use of GATB for employment referrals.

The Ninth Circuit in a later discussion of the Sixth Circuit's holding in Southern Ohio Coal Co. v. Donovan, supra, held that an appeal was not mooted in a case where a settlement had been reached, but involved different parties and issues than those raised in that appeal. United States v. Yakima Tribal Court, 794 F.2d 1402 (9th Cir. 1986):

> But here, the settlement was between the parties to the tribal court action, the Sohappys and the Interior Department. See Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 698-99 (6th Cir. 1985) (appeal not moot where settlement involved different parties and issues), amended 781 F.2d 57 (6th Cir. 1986). Before us we have the tribal court and its chief judge as appellants and the United States, represented by the Justice Department attorneys, as appellee. No party to this appeal nor any attorney was involved in the settlement.

United States v. Yakima Tribal Court, 794 F.2d 1402, 1405 (9th Cir. 1986). In this action before the Court are two parties, the class of steelworkers and the Commonwealth. While the class of steelworkers were involved in the prior settlement, that settlement was made with two other parties, Allegheny Ludlum and the United Steelworkers of America, and did not involve the Commonwealth. One of the factors mitigating against mootness in Yakima was the existence of an order restraining the federal officials therein from performing their official duties, and the fact that that order provided continuing consequences which imparted life to the controversy. Yakima, supra., at 794 F.2d 1402. Appellants herein do suffer continuing consequences as well.

The District of Columbia Circuit has also faced a situation wherein a question of mootness was raised and the government was a party. In Chemical Manufacturers Assoc. v. US EPA, 859 F.2d 977 (D.C. Cir. 1988), the EPA issued a rule known as a "final test rule" under the Toxic Substances Control Act. The petitioners challenged the rule. By the time the case was heard on appeal, EPA argued that the case was moot because all of the testing

contemplated by the rule had been completed. The Court held that the case was not moot:

> EPA argues that this petition for review is moot because all of the test results have been submitted. CMA does not seek damages or reimbursement for having conducted the tests. Thus, the agency argues, there are no residual effects of the testing requirement to keep the controversy alive. We nonetheless hold the case to be justiciable, because the rule continues to impose concrete obligations on companies handling EHA (2-ethylhexanoic acid).

Chemical Manufacturers Assoc. v. US EPA, 859 F.2d 977, 982 (D.C. Cir. 1988).

The alleged violation herein has also not ceased. County of Los Angeles v. Davis, 440 U.S. 625, 623, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979), and the effects of the alleged violation have not been eradicated. The two basic aspects of mootness: (1) that the issues presented are no longer live, or (2) that the parties lack a cognizable interest in the outcome are neither present herein. New Jersey Turnpike Authority v. Jersey Cent. Power, 772 F.2d 25, 31 (3d Cir. 1985).

In Franks v. Bowman Transportation Co., Inc., 424 U.S. 751, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the respondent Bowman argued before the Supreme Court of the United States that the case had become moot:

> The District Court found that Bowman had hired petitioner Lee, the sole-named representative of class 3, and had subsequently properly discharged him for cause, and the court of appeals affirmed. Bowman argues that since Lee will not in any event be eligible for any hiring relief in favor of OTR nonemployee discriminatees, he has no personal stake in the outcome, and therefore the question whether nonemployee discriminatees are entitled to an award of seniority when hired in compliance with the District Court Order is moot.

Franks v. Bowman Transportation Co., Inc., 424 U.S. at 751, 96 S.Ct. at 1259. The Supreme Court analyzed its prior ruling in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), in answering the mootness questioned raised in Bowman. In so doing

the Court noted that the personal stake requirement in the outcome of a controversy is designed to ensure concrete adverseness which sharpens the presentation of issues and upon which a court largely depends for illumination of difficult questions:

> Given a properly certified class action, Sosna contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill this function exists. In this case, that adversary relationship obviously obtained as to unnamed class members with respect to the underlying cause of action and also continues to obtain as respects their assertion that the relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits.

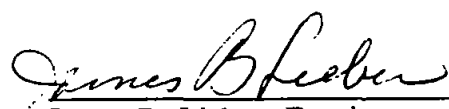
Franks v. Bowman, supra., at 96 S.Ct. 1260. Appellant steelworkers herein have received some of the relief that they requested in this lawsuit. They continue to maintain, however, that that relief is inadequate without further award of injunctive relief as to the continuing unlawful effects of the GATB test on their future careers. Thus, concrete adverseness necessary to sharpen presentation of the issues is present herein.

CONCLUSION

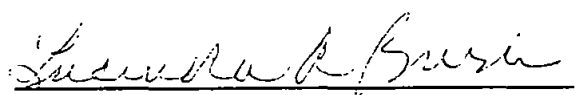
For the foregoing reasons Appellants respectfully request this Court enter an Order reversing the Order entered December 30, 1994 by the District Court and denying the Appellee Commonwealth's Motion for Summary Judgment.

Respectfully submitted,

LIEBER & HAMMER, P.C.



James B. Lieber, Esquire
PA I.D. # 21748



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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to LAR 46.1 I, James B. Lieber, do hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

March 17, 1995
Date

James B. Lieber
James B. Lieber

Pursuant to LAR 46.1 I, Lucinda A. Bush, do hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Mar 17, 1995
Date

Lucinda A. Bush
Lucinda A. Bush

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BLANCIAK, et al., Plaintiffs,	)	
v.	)	Civil Action No. 90-0931
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, ROBERT S. BARNETT, SECRETARY, JOHN KRISIAK, AND STELLA RAVETTO, et al. Defendants.	)	

ORDER OF COURT

AND NOW, this 30th day of December, 1994, after consideration of the sealed settlement agreement and joint tortfeasor release, Plaintiffs' Objections to Proposed Order of Court Dismissing Injunctive and Declaratory Relief against the remaining Commonwealth of Pennsylvania defendants (Document No. 170), briefs in support of and in opposition to the objections, and upon the entire record in this case, the Court remains of the opinion that the plaintiffs have insufficient personal stake in the outcome of these proceedings against these defendants to warrant any further prudential exercise of this Court's jurisdiction. Therefore, it is HEREBY ORDERED that plaintiffs' objections are **DENIED**.

It is FURTHER ORDERED that this Court's order entered June 7, 1994 (Document No. 159) is made a **FINAL ORDER OF COURT**; summary judgment in defendants' favor is **GRANTED**, and all

remaining claims against the remaining Commonwealth of Pennsylvania defendants are **DISMISSED WITH PREJUDICE.**

Donald J. Lee
United States District Judge

cc: all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BLANCIAK, et al., Plaintiffs,	)	
v.	)	**Civil Action No. 90-0931**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, ROBERT S. BARNETT, SECRETARY, JOHN KRISIAK, AND STELLA RAVETTO, et al. Defendants.	)	

MEMORANDUM OPINION AND ORDER

June 7, 1994

Before the court are the remaining defendants' motion for summary judgment which the magistrate judge to whom it was referred recommends granting in part, and objections by both the defendants and the plaintiffs to that recommendation.

Background

Without going into unnecessary detail, 20 original plaintiffs filed a complaint against Allegheny Ludlum Corporation, the United Steelworkers of America ("USW"), and the Commonwealth of Pennsylvania's Department of Labor and Industry (the "Department"), its Secretary and various of its employees on a variety of claims stemming from a "manning agreement" between Allegheny Ludlum and the USW to hire employees for Allegheny Ludlum's recently purchased Vandergrift, Pennsylvania plant, formerly owned by United States Steel (now USX), through the use of a preferential hiring list of former United States

Steel employees. Preference for hiring under said agreement was determined, inter alia, through the use of the General Aptitude Test Battery ("GATB") administered by the Department's Job Service office in Vandergrift.

The original complaint set forth nine separate counts, including claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216 and 217, the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, et seq, and civil rights claims under the Fourteenth Amendment and 42 U.S.C. § 1983. Plaintiffs brought suit as a "class action" under 29 U.S.C. § 216(b) on their own behalf and, according to the complaint,

> 8 . . . on behalf of all other persons similarly situated who are at least 40 years old who have been, are being, or will be adversely affected by the Defendants' unlawful age discrimination in employment policies and practices. The "Class" which Plaintiffs seek to represent, and of which Plaintiffs are themselves members, is composed of and defined as follows:
>
> > All persons, male and female, now named or hereafter executing and filing written consents to participate and join in this action, pursuant to 29 U.S.C. § 216(b), who were, at any time from on or about 1987-1988 to date:
> >
> > (a) at least 40 years of age;
> > (b) employed by USX at its United States Steel facility in Vandergrift, Pennsylvania; which plant was sold to Allegheny Ludlum;
> > (c) subject to a collective bargaining agreement, and represented by the USWA;
> > (d) involuntarily retired and/or not employed at Allegheny Ludlum for age motivated reasons;
> > (e) subjected to such adverse employment actions as described infra in connection with the Allegheny Ludlum manning program for

> Vandergrift and nearby facilities including Brackenridge and West Leechburg, Pennsylvania.
>
> 9. Plaintiffs are unable to state at this time the exact size of the potential Class but, upon information and belief, aver that it exceeds 50 persons. Written consents from members of such Class will be filed as additional opt-in Plaintiffs elect to join the Class.
>
> 10. As set forth herein, this class action meets the requirements for being maintained and prosecuted as a class action pursuant to 29 U.S.C. § 216(b) in that the named Plaintiffs and opt-in Plaintiffs were all similarly situated.

Complaint, ¶¶ 8-10.

Unlike a class action authorized by Rule 23 of the Federal Rules of Civil Procedure wherein class members are included in the settlement or judicial determination unless they opt-out of the class, the class mechanism embodied in Section 16(b) of the FLSA, 29 U.S.C. § 216(b), borrowed by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), requires putative class members affirmatively to opt-in to the suit. Sperling v. Hoffmann-LaRoche, Inc., ___ F.3d ___, 1994 U.S. App. LEXIS 9477, * 16 (3d Cir. 1994) (comparing several class action mechanisms). Sperling held that a representative action brought under the ADEA is commenced and the statute of limitations tolled on behalf of all consenting class members when the original representative complaint is filed, and, therefore, additional members may opt-in and join the class by filing the appropriate consents after the statute has run. 1994 U.S. App. LEXIS 9477 at *5.

In this case, additional plaintiffs did, in fact, opt-in to the class on or before August 31, 1991, the "cut-off" date

agreed to by the parties. Stipulation, Document No. 38. Forty-one plaintiffs ultimately were identified in the Supplemental Amended Complaint (Document No. 69), filed on January 24, 1992, which incorporated the previous counts and added counts for fraud and breach of contract against Allegheny Ludlum. All of these plaintiffs share the characteristics of the now-closed class set forth in paragraph 8 of the complaint.

The 40 remaining named plaintiffs (one plaintiff has previously been dismissed by stipulation, Document No. 92) have entered into a sealed settlement agreement with defendants Allegheny Ludlum and the USW, both of whom have been dismissed, with prejudice, by order of this court entered upon Stipulation of Dismissal. Order and Stipulation, Document No. 114. The settlement agreement has not been filed or otherwise made part of the record.

The only remaining defendants are the Commonwealth of Pennsylvania, Department of Labor and Industry, which plaintiffs describe in their complaint as "an Agency of the Commonwealth of Pennsylvania" which was "at all times relevant to the claims for relief . . . an employment agency . . . and a state actor . . . ," Robert S. Barnett, Secretary of the Department in his official capacity, and John Krisiak and Stella Ravetto, who are described as "employees of the [Department's] Job Service's offices in Vandergrift, PA and/or pertaining to the Allegheny Ludlum facilities in Vandergrift, Brackenridge, and West

Leechburg, PA, in both their official and their personal capacities." Complaint, ¶¶ 35, 36.[1]

The court has considered the remaining Commonwealth defendants' motion for summary judgment (Document No. 105) and supplement to motion for summary judgment (Document No. 110), plaintiffs' response (Document No. 112), numerous briefs and memoranda in support of and in opposition to summary judgment, memoranda by both sides on the effect of the settlement with the dismissed defendants, documentary material submitted in support of and in opposition to summary judgment, the magistrate judge's initial and supplemental Report and Recommendation ("R & R") on summary judgment (Documents No. 137 and 142), the objections of the Commonwealth defendants and the plaintiffs to the magistrate judge's R & R (Documents No. 143, 144 and 145) and responses thereto, and the transcript of the February 10, 1994 oral argument on the objections.

Having conducted a de novo review of the record relevant to these documents and motions as required by Section

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1. The other "Commonwealth defendants" are former Secretary of the Department of Labor and Industry, now U.S. Senator, Harris Wofford, Maurice Nates, and various John and Jane Does. The plaintiffs have agreed to dismiss former Secretary Wofford, in his personal capacity only, from this suit. Notes of Testimony, Oral Argument, February 10, 1994, at 35. His successor, Mr. Robert S. Barnett, is automatically substituted as a party for those claims against the Secretary of the Department in his official capacity. F.R.Civ.P. Rule 25(d)(1); Kentucky v. Graham, 473 U.S. 159, 166 (1985). The magistrate judge recommends dismissing the suit against the Doe defendants and Mr. Nates for lack of service, and the plaintiffs have not objected to that recommendation, which will be adopted.

636(b)(1)(B) and (C) of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), including the complaint as amended twice and the parties' pretrial statements,[2] this court now sustains the Commonwealth defendants' objections, rejects the plaintiffs' objections, and will adopt the magistrate judge's recommendation to dismiss most of the remaining claims against the remaining defendants. However, with regard to the ADEA claims of certain plaintiffs for damages against the Commonwealth defendants in their official capacities, such claims for damages, contrary to the magistrate judge's view, are barred by the Eleventh Amendment and will be dismissed as well. On the other hand, plaintiffs' claims under the ADEA and civil rights statutes for prospective injunctive and declaratory relief against the individual Commonwealth defendants in their official capacities are neither barred by the Eleventh Amendment nor, as the magistrate judge opined, by the applicable statutes of limitations. However, those equitable claims are in all likelihood moot. Accordingly, this court will enter summary judgment in favor of the remaining Commonwealth defendants and against the plaintiffs on all remaining claims except as set forth herein.

Standards for Review

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2. The court is aware the Commonwealth defendants have filed a motion to strike the plaintiffs' pretrial statement (Document No. 109), which, at first glance, shows merit. For the reasons stated in this opinion, however, there is no need to address this motion which will be dismissed as moot.

A de novo determination requires the district court to consider the record which has been developed before a magistrate judge and to make its own determination on the basis of that record, without being bound by the findings and conclusions. Taberer v. Armstrong World Ind., Inc., 954 F.2d 888, 904 (3d Cir. 1992). The Third Circuit has delineated the standards of review by the district court of a Magistrate Judge's rulings in Haines v. Liggett Group, Inc., 975 F.2d 81, 91 (3d Cir. 1992), as follows:

> The clear and unambiguous language of the statute thus provides for different standards of review when the district court "reconsiders" rulings of the magistrate judges in non-dispositive matters under (b)(1)(A) and when it considers "written objections" to "proposed findings and recommendations" of the magistrate judge in dispositive matters under (b)(1)(B) and (C). Under (b)(1)(A), the standard of review is circumscribed. The district court is bound by the clearly erroneous rule in findings of facts; the phrase "contrary to law" indicates plenary review as to matters of law. See also Rule 72(a), Fed.R.Civ.P. ("Nondispositive Matters"). Under (b)(1)(B) and (C), the district court is permitted to make a de novo determination of proposed findings and recommendations, may accept, reject or modify, in whole or in part, the findings and recommendations, and "may also receive further evidence." See also Rule 72(b), Fed.R.Civ.P. ("Dispositive Motions and Prisoner Petitions").

The substantive standards regarding summary judgment are well settled. In interpreting Rule 56(c) of the Federal Rules of Civil Procedure,[3] the United States Supreme Court has ruled:

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3. Fed.R.Civ.P. 56 in pertinent part reads as follows:

> [Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

(continued...)

> The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986).

An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed 2d 202 (1986). The Court must view the facts in a light most favorable to the non-moving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. Id. at 477 U.S. 242. The "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.'" Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978), quoting Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' -- that is, pointing out to the District Court -- that

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3. (...continued)
material fact and that the moving party is entitled to judgment as a matter of law.

there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is "merely colorable" or "not significantly probative," the Court may grant summary judgment. Anderson, 477 U.S. at 249-50.

Discussion

Plaintiffs' Supplemental Amended Complaint requests the court to award the following relief:

(a) Assume jurisdiction herein;

(b) Declare Defendants' conduct to be unlawful and in willful violation of Plaintiffs' rights;

(c) Grant Plaintiffs an order requiring Defendant Allegheny Ludlum to make them whole by re-employing them in suitable positions commensurate with their qualifications, seniority, and compensation levels, as if their service had been continuous;

(d) Award Plaintiffs compensatory damages including back pay, loss of fringe, pension and profit sharing benefits, any other emoluments of employment and interest up to the date of re-employment and/or back pay, front pay, loss of fringe, pension, and profit sharing benefits and any other emoluments of employment and interest until age 70;

(e) Award Plaintiffs liquidated and punitive damages in appropriate amounts;

(f) Award Plaintiffs compensatory damages for emotional distress, embarrassment, humiliation and inconvenience;

(g) Award appropriate class wide relief;

(h) Award Plaintiffs costs and attorneys' fees;

(i) Monitor the offices of Defendant Job Service which serve Allegheny Ludlum's Vandergrift, West Leechburg, and Brackenridge plants for a period of at least one year with regard to the treatment of older work force members;

(j) Preliminarily and permanently enjoin Defendant Allegheny Ludlum from filling hourly positions at its Vandergrift facility in a manner which discriminates on the basis of the age of the job applicants.

Document No. 69, at pp. 26, 27, Prayer for Relief.

As is apparent from the limited nature of the § 16(b) opt-in mechanism and the now-closed class which plaintiffs represent, and from the specific relief sought in their complaints and throughout the course of these proceedings, the central thrust of this case has been the allegedly unlawful age discriminatory practices of all defendants with regard to the hiring of former United States Steel-Vandergrift employees by Allegheny Ludlum and plaintiffs' attempts to remedy those practices through appropriate money damages and equitable relief pertaining to future hiring by Allegheny Ludlum at that facility and, perhaps, its West Leechburg and Brackenridge plants. The only declaratory or injunctive relief specifically requested concerning the Commonwealth defendants is that the court (i) declare all defendants' conduct "to be unlawful and in violation of Plaintiffs' rights," and (ii) "monitor" the Vandergrift Job

Service facility for a period of at least one year with regard to its treatment of older workers, presumably, from the context of the complaint, description of the now-closed class and the development of this entire litigation, with regard to the hiring of former United States Steel workers at the Allegheny Ludlum Vandergrift and other facilities. Generally, the "catch-all" request is for "appropriate class wide relief."

The court finds plaintiffs' ADEA claims against the Department are made against it in its capacity as an employment agency and those ADEA claims against its Secretary and employees arise from their conduct as official and employees of an employment agency. In light of that finding and the above standards of review, the court disagrees with the magistrate judge and holds that the plaintiffs' claims for monetary damages against the Commonwealth, its Department and Secretary, and its employees in their official capacities under the ADEA for conduct performed in administering the GATB as an employment agency, are barred by the Eleventh Amendment as this Court recently held in Radeschi v. Commonwealth of Pennsylvania, Dep't of Labor and Indus., 846 F. Supp. 416 (W.D. Pa. 1993).

This court stated in Radeschi:

> Section 623 of the ADEA makes it unlawful for an "employer" to fail or refuse to hire or to discharge or otherwise discriminate against any individual because of such individual's age. 29 U.S.C. § 623(a)(1). The same section of the ADEA makes it unlawful for an "employment agency" to fail or refuse to refer for employment or otherwise discriminate against any individual because of such individual's age. 29 U.S.C. § 623(b). The term "employer" is defined in § 630 of the ADEA as "a person engaged in an industry affecting commerce" with twenty or

more employees, while an "employment agency" is defined as "any person regularly undertaking with or without compensation to procure employees for an employer." 29 U.S.C. § 630(b) & (c).

In 1974, Congress explicitly expanded the statutory definition of "employer" to include a "State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. § 630(b). According to most but not all courts that have addressed the issue, Congress has made "unmistakably clear" by this amendment its intent to abrogate states' Eleventh Amendment immunity to that extent. Davidson v. Board of Governors of State Colleges & Univs., 920 F.2d 441, 442-43 (7th Cir. 1990); Swanson v. Colorado Dept. of Health, 773 F. Supp. 255, 257-58 (D. Colo. 1991)(collecting cases). This court need not and does not decide where the Third Circuit would align itself on this issue, however, because this case does not arise in the state-as-employer context but in the state-as-employment agency context.

Defendants are sued not as plaintiff's employer but for alleged ADEA and PHRA age discrimination violations while acting as an employment agency through the Department's BES [in administering GATB tests to applicants]. The issue therefore is whether Congress has abrogated states' immunity from suit in federal court in ADEA cases involving a state acting in its capacity as an "employment agency." Clearly, Congress has not manifested such an intent and has not made "unmistakably clear" an intention to abrogate the Eleventh Amendment in the "employment agency" situation. This court is not at liberty to infer such an intent.

To the contrary, Congress' explicit amendment of "employer" in 1974 to include States, coupled with its failure to similarly amend the definition of "employment agency," indicates if anything, a deliberate decision not to abrogate states' immunity in the employment agency context. Therefore, because Congress, through the ADEA, has not abrogated sovereign immunity for state-run employment agencies, the Eleventh Amendment bars this court's consideration of plaintiff's ADEA claims, as well as his state PHRA claims. Pennhurst, supra at 465 U.S. 121.

846 F. Supp. at 420-21 (some emphasis added).

The court declines plaintiffs' invitation to overrule Radeschi or to recognize the strained distinction from Radeschi they now urge upon the court, nor are plaintiffs' "policy

arguments" and legislative history analysis persuasive in light of the plain language of the ADEA and Congress' failure to make it "unmistakably clear" that it intended to abrogate a state's immunity in the employment agency context.[4] To the extent that plaintiffs' claims can be construed as setting forth an "agency" theory, as plaintiffs now claim, i.e. these defendants were acting as "agents" of Allegheny Ludlum Corporation (a dubious proposition that finds little support in the pleadings), any such "agency" claims are foreclosed by the settlement agreement with Allegheny Ludlum which applies by its terms to all claims against its "agents," relevant portions of which have been referenced under seal.[5]

Even if the court were to credit such an "agency" theory, it would avail plaintiffs nothing. While Congress may have made

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4. As the Third Circuit stated in its statutory construction of the ADEA in Sperling, "the decision we make today strikes us as a fairly routine application of the traditional rule of statutory construction pithily captured in the Latin maxim expression unius est exclusion alterius . . . [or] 'expression of one thing is the exclusion of another.'" Sperling, 1994 U.S. App. LEXIS 9477 at * 25 (citation omitted).

5. The Commonwealth Defendants' Reply Brief (Document No. 152) filed under seal sets forth the relevant language of the settlement agreement which releases "any claim or right of action [plaintiffs] may have against Allegheny Ludlum, [and] its . . . agents . . . ." The agreement reserved the right to "pursue existing claims against the Commonwealth Defendants, other than Company Releasees . . .," and "Company Releasees" includes agents of the Company. Accordingly, the release extinguishes claims against the Commonwealth defendants in any capacity as an agent of Allegheny Ludlum. As to the continued confidentiality of and the public's right of access to a sealed settlement agreement that has been made part of the judicial record in a case, see Pansy v. Borough of Stroudsburg, 1994 U.S. App. LEXIS 9389 (3d Cir. 1994).

it "unmistakably clear" that it intended to abrogate the Eleventh Amendment" immunity of the states as employers, Davidson v. Board of Governors of State Colleges & Univs., 920 F.2d 441, 442-43 (7th Cir. 1990), there is no indication, and plaintiffs have not offered any authority for the proposition, that Congress intended to abrogate a state's immunity when it has aided and abetted on some level or acted as an agent for a private employer. Whatever the Commonwealth of Pennsylvania did in this case, it did it as an employment agency, and the Eleventh Amendment immunizes it from suit in federal court in that context.

Moreover, as the magistrate judge concluded correctly, the plaintiffs' claims under 42 U.S.C. § 1983 against the Commonwealth and its Department, for either damages or equitable relief, are entirely foreclosed by the Eleventh Amendment. Alabama v. Pugh, 438 U.S. 781 (1978). Furthermore, as the magistrate judge observed, the Supreme Court has made it clear that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (because suit was prosecuted in state court, the Eleventh Amendment posed no barrier to suit against the state in its own courts).

Similarly, any claims for damages against the state officials/employees acting in their official capacities under either the ADEA or § 1983 are foreclosed by the Eleventh Amendment, even if the damages could be characterized somehow as

"equitable relief," because the payment of the award would have to come from the Commonwealth treasury. See, e.g. Quern v. Jordan, 440 U.S. 332, 336-37 (1979)("In Edelman[v. Jordan, 415 U.S. 651 (1974)] we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment . . . [even if] styled 'equitable restitution'"); Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989)(Eleventh Amendment does not bar suits against state officials for money damages unless the damages sought would come from state treasury); Karpovs v. State of Mississippi, 663 F.2d 640, 643 (5th Cir. 1981)(Eleventh Amendment immunity extends beyond state and encompasses state agencies, officials and employees when the action is in essence one for the recovery of money from the state's coffers); Spicer v. Hilton, 618 F.2d 232, 236 (3d Cir. 1980)("a monetary award indistinguishable from one against the state itself is prohibited even when the suit is filed against nominal state officials"); Clyde v. Thornburgh, 533 F. Supp. 279 (E.D.Pa. 1982)(damage claims against state officials in their individual capacities not barred, but in their official capacities prohibited because payment would have to come from state funds).

"Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" Will, 491

U.S. at 71, n.10, quoting Kentucky v. Graham, 473 U.S. 159, at 167, n.14 (1985). Similarly, suits for equitable relief against state officials in their official capacities are not treated as suits against the state for Eleventh Amendment purposes. E.g. Kentucky; Edelman.

Although it is a legal fiction which seemingly disregards the language of the Eleventh Amendment, this limited exception for prospective injunctive relief against state officials sued in their official capacity is a fiction of long-standing and is firmly established. Ex Parte Young, 209 U.S. 123 (1908); Spicer, 618 F.2d at 236. Thus against the Commonwealth official and employees in their official capacities, prospective injunctive and declaratory relief is the only relief which is not precluded by the Eleventh Amendment. See Spicer; Quern; Defeo v. Sill, 810 F. Supp. 648, 654-55 (E.D. Pa. 1992); Atlantic Health Care Benefits Trust v. Foster, 809 F. Supp. 365, 367-68 (M.D. Pa. 1992), aff'd 6 F.3d 778 (3d Cir. 1993); Greco v. Commonwealth of Pennsylvania, 1991 U.S. Dist. LEXIS 17980 (E.D. Pa. 1991). This exception does not include "front pay" in lieu of the equitable remedy of reinstatement because, although reinstatement itself might not be precluded by the Eleventh Amendment, see Clyde v. Thornburgh, supra, front pay is clearly payment of damages to remedy past wrongs and, as such, may not come out of the state treasury according to Edelman and its progeny. See also Green v. Mansour, 474 U.S. 64, 68 (1985) (while the Eleventh Amendment does not prevent federal courts from granting prospective

injunctive relief to prevent or end a continuing violation of federal law even if it may cost the state some money, the Supreme Court has refused to extend that reasoning to claims for retrospective relief designed to compensate a plaintiff for past violations); Municipal Auth. of Bloomsburg v. Commonwealth of Pennsylvania, Dep't of Envtl. Resources, 496 F. Supp. 686, 690 (M.D. Pa. 1980)("the label attached to Plaintiffs' theory [of relief] is of no importance. If the relief requested requires the payment of state funds to compensate the Plaintiffs for past actions subsequently found to be unlawful, that relief is barred by the Eleventh Amendment."). Cf. Hutto v. Finney, 437 U.S. 678 (1978)(fines imposed by district court to enforce and coerce compliance in future with prior court order are the sort of award of money from the state's coffers which will survive the Eleventh Amendment's immunity bar); Kentucky, 473 U.S. at 170-71 (where injunctive relief awarded against state officials sued in their official capacities, attorneys fees may be available against state under 42 U.S.C. § 1988; such fees are unavailable against state where state officials are found liable only in their individual capacities).

In many cases, including this one, the complaint will not specify whether individual state officials/employees are sued in their official or their personal capacities, and it awaits development of the proceedings to determine the nature of the liability sought. Graham, 473 U.S. at 167 n.14. Throughout the course of these proceedings, the plaintiffs have not claimed

that the Secretary or the state employees have acted in any manner but officially, and have not really pressed claims against them in their personal capacities. The proceedings against these individual defendants have been directed to their performance of their official duties in administering GATB and assisting the hiring of employees for Allegheny Ludlum through the Job Service office, and there is no support in the record for any suggestion that they acted intentionally or wilfully to further their own motives. There is no need to make an extensive "personal capacity" analysis to determine whether these defendants might be personally liable for damages or equitable relief ala Hafer v. Melo, U.S. , 112 S.Ct. 358 (1991), because plaintiffs have not met their burden of pointing to specific record evidence that might support an inference of "personal capacity liability," and the court will dismiss any such claims against defendants Krisiak and Ravetto on that basis.

The magistrate judge also recommended that the § 1983 claims of many of the plaintiffs were barred by the applicable two-year statute of limitations. See Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir.), cert. denied 474 U.S. 950 (1985). However, it would seem the statute of limitations on these § 1983 claims would be extended by the same "continuing violation" principles which the magistrate judge correctly found applicable regarding the ADEA claims. See e.g.: Cornwell v. Robinson, 1994 U.S.App. LEXIS 10112 (2d Cir. 1994); Hull v.

Cuyahoga Valley Joint Vocational Sch. Dist., 926 F.2d 505, 509 (6th Cir.), cert. denied 111 S.Ct. 2917 (1991); Lickteig v. Landauer, 1991 U.S.Dist. LEXIS 18307 (E.D. Pa. 1991)(collecting cases). Moreover, the filing of the initial complaint by the 20 representative plaintiffs tolled the statute of limitations for those plaintiffs who subsequently opted-in, pursuant to 29 U.S.C. § 216(b). Sperling.

After appropriate summary judgment is entered in accordance with this opinion, only the claims for prospective injunctive and declaratory relief will remain against the Department Secretary and its two Job Service employees.

Mootness

Ultimately, the magistrate judge recommended summary judgment against plaintiffs on all § 1983 claims, including those for prospective injunctive and declaratory relief. The court provisionally accepts that recommendation, but for a more fundamental, jurisdictional reason, namely that what remains of this case now appears to be, essentially, moot, presenting no live case or controversy sufficient to sustain this court's continued jurisdiction over the matter, or if minimally sufficient from the constitutional standpoint, insufficient to warrant the prudential exercise of this court's discretion to proceed.

It is "axiomatic that the federal courts may not decide an issue unless it presents a live case or controversy . . .

[which] limitation 'derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" Abdul-Akbar v. Watson, 4 F.3d 195, 206 (3d Cir. 1993), quoting DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (additional citations omitted). There must be actual injury which a court may redress to supply the requisite live case or controversy to "assure that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to realistic appreciation of the consequences of judicial action." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 (1976).

A case "is moot, and thus not an Article III case or controversy, when the issues are no longer live or the plaintiff is unable to benefit from the relief requested." Daly v. Wigen, 1994 U.S. Dist. LEXIS 1139, *4 (E.D. Pa. 1994), citing Murphy v. Hunt, 455 U.S. 478, 481 (1982). "The mootness, standing, and other doctrines that make up the case or controversy requirement under Article III of the Constitution are comprised of judicially self-imposed, prudential restraints on federal jurisdiction. The central elements of the case or controversy requirement, however, are an 'irreducible minimum required by the Constitution.'" Rosetti v. Shalala, 12 F.3d 1216, 1223 (3d Cir. 1993) (further citations omitted).

As Judge Lewis stated for the Third Circuit in Rosetti, part of the constitutional component of the mootness doctrine is

that the plaintiff maintain a "personal stake" in the outcome of the litigation, and where developments occurring during the course of an adjudication eliminate the plaintiff's personal stake in the outcome of the suit, the federal court must dismiss the case as moot. Id. at 1223-24. See also International Bhd. of Boilermakers v. Kelly, 815 F.2d 912, 914-16 (3d Cir. 1987) (Mootness doctrine incorporates both constitutional and prudential considerations and is "fundamentally a matter of degree; there is no precise test for ascertaining with precision whether a particular claim has become moot," but the central question of all mootness problems is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief"). These principles apply to declaratory relief as well as to injunctive relief. See Green v. Mansour, supra at 72 (the declaratory judgment act confers discretion on the courts rather than any absolute right upon the litigant, and the exercise of that discretion is informed by the teachings and experience concerning the functions and extent of the federal judicial power); A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961) (where ICC withdrew temporary freight rates, suit for declaratory judgment that rate making procedures were flawed was moot despite plaintiffs' assertion that ICC made a habit of withdrawing rates so enacted when challenged); Versarger v. Township of Clinton, 984 F.2d 1359 (3d Cir. 1993)(both reinstatement and declaratory relief unavailable

where changed circumstances render requested relief impracticable).

"Settlement of a plaintiff's claims moots an action." Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992). Settlement of a class action by the individual representative class plaintiffs presents several sophisticated nuances which make the mootness issue "more complex." Rosetti, 12 F.3d at 1225; Lusardi, 975 F.2d at 973-84. And, settlement of a suit against less than all of the defendants does not necessarily foreclose suit against the remainder. Fleet Aerospace Corp. v. Holderman, 796 F.2d 135, 138-39 (6th Cir. 1986). However, where the settlement effectively supplies all the relief which plaintiffs had sought, a settlement with some defendants represents a sufficient change of circumstances to render the case against the remaining defendants moot. S-1 v. Spangler, 832 F.2d 294 (4th Cir. 1987) (where settlement with City Board of Education obtained tuition reimbursement for students, "the ultimate object of their action for injunctive and declaratory relief against the State Board" of Education and its Chair, prudential considerations dictated against continuation of suit for equitable relief against state and its official because such relief "no longer has sufficient utility to justify decision of this case on the merits."). See also Rosetti, 12 F.3d at 1233 (where Secretary of Health and Human Services adopted new regulation in appropriate manner, suit would have been moot if

a properly enacted regulation was all the relief that plaintiffs had requested).

Under all of the circumstances, including the precise and limited dimensions of the closed class of 40 plaintiffs and the specific relief they have pursued throughout these proceedings, any claim for equitable relief regarding the plaintiffs' reinstatement at Allegheny Ludlum certainly appears to be moot, in light of what the court knows of the sealed settlement agreement (which was not attached to the stipulation to dismiss Allegheny Ludlum and the USW nor made part of the order of court dismissing these defendants) because these plaintiffs appear no longer to have a personal stake in the outcome of proceedings on the remaining claims against the Commonwealth defendants. As the Third Circuit recently stated in the closely related standing context in Wheeler v. Travelers Insurance Co., 1994 U.S. App. LEXIS 9187, *16 (3d Cir. 1994):

> We make one final point. The district courts are coping with large volumes of litigation, and parties with real losses frequently are delayed in obtaining adjudications on the merits. The mission of the federal courts best can be fulfilled if the courts recognize and enforce the constitutional and prudential limitations on the exercise of their jurisdiction. That way the courts will have time to devote to claims by parties who actually have been injured and may be entitled to relief on their own behalf.

For the foregoing reasons, this court has no jurisdiction over the remaining claims in this case if, as the court strongly suspects, the sealed settlement agreement provides all the relief requested and pursued in this case which concerns the hiring of former United States Steel-Vandergrift employees over

the age of forty at the Allegheny Ludlum facilities and the Commonwealth Defendants' use of the GATB's at the Job Service in Vandergrift to determine preferences for hiring members of the plaintiff class. See Rosetti, 12 F.3d at 1233. Any claims in the abstract regarding the possible age-discriminatory effect of the GATB tests as administered to some other workers or in some other employment referral context are simply too amorphous to permit the prudential exercise of the federal judicial power. The plaintiffs have no standing to seek to vindicate the rights of third-parties who might be adversely affected by continued administration of GATB. Wheeler, 1994 U.S. App. LEXIS 9187 at *13.

Accordingly, the Commonwealth defendants' Motion for Summary Judgment (Document No. 105) will be GRANTED and the remaining claims against them for injunctive and declaratory relief DISMISSED with prejudice on June 17, 1994, unless plaintiffs file with the court, on or before that date, Objections to Proposed Order of Court Dismissing Injunctive and Declaratory Relief, together with a copy of the executed settlement agreement attached as an exhibit.[6]

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6. The court notes without deciding defendants' objections to plaintiffs' recently asserted claims for injunctive and declaratory relief pertaining to the Department's use of the General Aptitude Test Battery, or "GATB," in general, and not just with regard to the Allegheny Ludlum facilities. Defendants rightly point out plaintiffs have only recently added these specific equitable claims for relief to their mix of relief requested and pursued throughout these proceedings. While this court will not rule on these objections at this time, it must be observed that amendments to complaints and

(continued...)

6. (...continued)
other pleadings are liberally permitted in the federal courts, see Brandon v. Holt, 469 U.S. 464, 471 and 471 n.19 (1985), and that plaintiffs included a request for "appropriate class wide relief" in their supplemental amended complaint. What is "appropriate" relief is interdependent on the nature of the class and the course of the litigation as a whole.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BLANCIAK, et al., Plaintiffs,	)	
v.	)	**Civil Action No.90-0931**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, ROBERT S. BARNETT, SECRETARY, JOHN KRISIAK, AND STELLA RAVETTO, et al. Defendants.	)	

PROPOSED ORDER OF COURT

AND NOW this 3rd day of June, 1994, the Motion of the Commonwealth of Pennsylvania, Department of Labor and Industry and the individual Commonwealth defendants for Summary Judgment (Document No. 105) is **GRANTED IN PART AND DENIED IN PART**; said motion is **GRANTED** in defendants' favor as to all claims, whether in their personal or their official capacities, except those claims for prospective injunctive or declaratory relief against the individual Commonwealth defendants John Krisiak and Stella Ravetto in their official capacities, and the current Secretary of the Commonwealth's Department of Labor and Industry, Mr. Robert S. Barnett, in his official capacity, who is automatically substituted as a party for former Secretary (now U.S. Senator) Harris Wofford pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure for any further proceedings.

The claims for injunctive and declaratory relief against

the individual Commonwealth defendants in their official capacities will be dismissed and this order will become final on June 17, 1994, unless, on or before June 17, 1994, plaintiffs file Objections to Proposed Order of Court Dismissing Injunctive and Declaratory Relief, together with a copy of the settlement agreement which will then become part of the public record in this proceeding. See Pansy v. Borough of Stroudsburg, 1994 U.S. App. LEXIS 9389 (3d Cir. 1994).

In the event plaintiffs file timely objections to the proposed order of court, plaintiffs shall file a Memorandum in Support of Objections not to exceed 25 pages on or before June 24, 1994. The Commonwealth defendants shall thereafter file a Memorandum in Opposition to Objections not to exceed 25 pages on or before July 15, 1994. No further memoranda shall be filed.

It is further **ORDERED** that the Commonwealth defendants' Motion to Strike Plaintiffs' Pretrial Statement (Document No. 109) is **DENIED** as moot.

Donald J. Lee
United States District Judge

cc: All counsel of record.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Brief was served upon the following person by federal express the 17th day of March, 1995.

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